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CHANCERY
CASES. AND DICTA,

ALSO

NOTES FROM MSS.

ANCIENT AND MODERN,

WITH OCCASIONAL REMARKS;

AND

Chancery Miscellanies.

CHANCERY CASES AND DICTA,
No. I.

BY

CHARLES PURTON COOPER, ESQ.,

ONE OF HER MAJESTY'S COUNSEL.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Booksellers and Publishers.

1852.

[Price Sixpence.]



"Chancery Cases and Dicta, also Notes from MSS. Ancient and Modern, with occasional Remarks;" and "Chancery Miscellanies."—These are parts of the same work. The printing of the latter was commenced some time ago, but the printing of the former has, from an unexpected demand upon the writer's time, been delayed until now.—[*May*, 1851. *See below*.]

A Monthly issue of the "Chancery Miscellanies" was announced—but it was soon abandoned as inconvenient.

The plan of the work renders it necessary to suspend the progress of the "Chancery Miscellanies" until the "Chancery Cases and Dicta" shall have reached the point at which its companion has arrived. The two will then appear under the same wrapper.

More than twelve months have elapsed since the foregoing lines were written, and the present sheet was placed in the printer's hands: it has actually been in type during great part of that time. This makes it requisite to state that some of the cases and dicta contained in it would have been omitted, or at least postponed, had the selection been made subsequently to the Report of the Chancery Commissioners, and the introduction into the House of Lords of the Improvement of the Jurisdiction of Equity Bill, as the future application of them seems problematical. In general, those cases and dicta will be excluded, which expected changes in practice or doctrine will, if carried into effect, deprive of authoritative utility.

12, NEW SQUARE, LINCOLN'S INN,
21st June, 1852.

CHANCERY CASES AND DICTA, ALSO NOTES FROM
MSS. ANCIENT AND MODERN, WITH OCCASIONAL
REMARKS.

I.

Hobkirk v. Hobkirk.

The plaintiffs, six in number, joined in filing a bill for an account of the residue of an estate to which they were entitled. The principal defendant was the mother of four of the plaintiffs; and the bill containing charges of misconduct against her, three of the four moved that the bill, so far as they were concerned, might be dismissed with costs. Two of the three were resident in France.

V. C.
Feb. 1819.

There being six co-plaintiffs, motion by three of them that the bill, so far as they were concerned, might be dismissed, with costs.

Sir John Leach.—Although before the hearing of a cause it is a motion of course on the part of all the plaintiffs that the bill may be dismissed with costs, yet such a motion is very far from being a motion of course, if made on behalf of some only of the plaintiffs. Persons having joined with others having a similar interest in the institution of a suit will not be permitted to divest themselves of the character of plaintiffs, which they have voluntarily assumed, and to become defendants, if such a proceeding will be injurious to the remaining plaintiffs. No order to dismiss the bill can be made, nor can there be an order for the amendment of the bill by making these three plaintiffs defendants, unless that plaintiff moving who is within the jurisdiction will undertake to put in his answer within a fortnight after he is served with a subpoena, and the defendants will appear upon this motion and consent to dispense, at the hearing of the cause, with any evidence to prove that the other two plaintiffs moving are resident in France. The admission of the defendants, that these two plaintiffs, when made co-defendants, are out of the jurisdiction will prevent the delay that the necessity of proving such

fact would otherwise occasion. In this way the remaining plaintiffs would not be prejudiced.

The defendants when applied to, declining to dispense at the hearing of the cause with the above mentioned evidence, the motion was refused with costs.

Remarks.

This is the same case as is reported, 4 Madd. 50, under the date of 29th January, 1819. It is there entitled *Holkirk v. Holkirk*. According to Maddock there were two defendants, the mother, the executrix, and another person who was executor with her, and it being suggested that her consent alone not to object at the hearing would not be sufficient, Sir John Leach said, "Her consent out of court would bind the other defendant, the executor, and so it will in court." Maddock adds that the motion was granted.

The ensuing extract from the Registrar's Book coincides with the author's note, and shows that the motion was *not* granted. It is hardly possible that Sir John Leach could have used the language ascribed to him by Maddock.

6th February, 1819.—Samuel Hobkirk and others plaintiffs; Mary Hobkirk and others defendants. V. C. Whereas Mr. Bell of counsel for the plaintiffs, Adam Hobkirk, James Cartwright Hobkirk, and Samuel Hobkirk, this day moved and offered divers reasons unto this court that the bill filed in this cause, as far as they were concerned, might be dismissed with costs, in the presence of Mr. Collinson, of counsel for the plaintiffs William Hobkirk, John Vale, and Henry Lees, whereupon and upon hearing what was alleged by the counsel for the said parties, this Court doth not think fit to make any order on the said motion, but doth order that the said plaintiffs Adam Hobkirk, James Cartwright Hobkirk, and Samuel Hobkirk do pay unto the said William Hobkirk, John Vale, and Henry Lees their costs of this application, to be taxed by Mr. Stratford, one of the Masters of this Court, in case the parties differ about the same.—Reg. Lib., A. 1818, fol. 617.

See *Jackson v. Burton*.^{*} The Vice Chancellor, after saying that the plaintiff having once embarked in the suit, could not be permitted to withdraw from it, so as to embarrass his co-plaintiffs, added, that he could not be allowed even to dismiss the bill, paying the defendants all the costs of the suit, unless by a very special order, by which provision would of course be made that his co-plaintiffs should in nowise be prejudiced.

However, in *Langdale v. Langdale*,[†] a motion was made by one co-plaintiff, that the bill, as far as he was concerned, might be dismissed with costs. The defendant consented to the motion, but there being no consent by the other co-plaintiff, the Registrar declined to draw up the

^{*} 2 Rep. temp. Cott. 213.

[†] 13 Ves. 167.

order. In support of the motion, it was said that there was no occasion to give notice to the other co-plaintiff. The Lord Chancellor made the order.

Lord Erskine is said to have made the order on the authority of the case of *Bathen v. Needham*, sittings after Hilary Term, 1797, Wyatt, Prac. Reg. 179. One co-plaintiff may dismiss his bill as against himself with costs without the consent of the other co-plaintiffs, and the Chancellor said it was a motion of course.

According to our present practice, such an order would plainly be irregular. Search has been made in the Registrar's Book both for the order in *Langdale v. Langdale*, and in that of *Bathen v. Needham*, but without success.

John Miller and Mary his wife, Martha Fenny, widow, Newcome Smith, Barlow Smith, (since deceased), Anne Smith, widow, (since deceased), Eliza Smith, spinster, Benjamin Todhunter, and Anne his wife, Henry Moore, and Eliza his wife, and Samuel Smith Shipley. Plaintiffs.

Samuel Smith, George Smallfield, Edward Garsted, John Stephenson Smith, William Smith, (since deceased), Elizabeth Ann Smith, Rachel Smith, Jane Bailey, (since deceased), and Thomas Smith, out of the jurisdiction of the Court . . Defendants.

V. C.
Dec. 1838.

This was a bill by legatees and annuitants. The defendants Samuel Smith, Smallfield and Garsted were the executors. The defendant Samuel Smith was also a legatee under the will. The bill was filed in February, 1833; but nothing had been done in the cause since February, 1837, when subpoenas to rejoin were served. This was owing to a disagreement between the plaintiffs, some of whom had instructed the solicitor for the plaintiffs not to proceed further in the suit. The plaintiff Shipley was the largest legatee under the will, and being desirous that the suit should be brought to a hearing, Messrs. Gibson and Whichelo, as his solicitors, in December, 1838, served the clerk in court of the plaintiffs with a notice that the plaintiffs Miller and wife, Fenny, Newcome Smith, Eliza Smith, Todhunter and wife, and Moore and wife, (the plaintiffs Barlow Smith and Anne Smith, annuitants under the will, being dead) might be ordered, in conjunction with the said plaintiff Shipley, to proceed with and prosecute the suit, or that it might be

Before decree all the plaintiffs, except one, instruct the solicitor for the plaintiffs not to proceed further with the suit, and such solicitor refuses to proceed with the suit. Order, under the circumstances, upon motion of that one plaintiff, that he should have the conduct of the suit, he submitting to such order as the Court might make as to future costs of the cause.

ordered that the conduct of the cause might be given to the plaintiff Shipley, and that the costs of that application on behalf of the plaintiff Shipley might be costs in the cause.

In support of this notice of motion, the plaintiff Shipley filed an affidavit, by which, after stating that nothing further had been done in the cause since the subpoenas to rejoin were served as aforesaid, and that the estate of the testator remained unadministered, owing to some disagreement having taken place between the other surviving plaintiffs and the plaintiff Shipley; and that, in consequence of such disagreement, the said other surviving plaintiffs had instructed Mr. Aston, the solicitor for the plaintiffs, not to proceed further with the suit; the plaintiff Shipley further stated—that the said other surviving plaintiff had so instructed Mr. Aston not to proceed further with the suit, in order to harass the plaintiff Shipley, by keeping him out of his legacy; and that, notwithstanding he had frequently requested Mr. Aston to proceed with the suit, he refused so to do. That it was a matter of the greatest importance to the plaintiff Shipley, that the suit should be proceeded with and prosecuted, and the estate of the testator administered. That the plaintiff Shipley submitted that the suit should either be proceeded with and prosecuted by the said other surviving plaintiffs, in conjunction with him, or that the Court should give the conduct of the cause to him; that he had always been and then was ready and willing to concur with the said other surviving plaintiffs in proceeding with and prosecuting the suit; and that he was also ready and willing to proceed with and prosecute the suit, in case the Court should be pleased to give the conduct of the cause to him.

The opposition to the motion was mainly founded upon the affidavit of the plaintiff Benjamin Todhunter. It appeared, from that affidavit, that in May, 1832, a bill was filed by the defendants Garsted and Smallfield against the defendant Samuel Smith and the plaintiff Shipley, praying an account of partnership and other dealings and transactions between the testator aforesaid and the defendant Samuel Smith; and if the testator ever took or admitted the plaintiff Shipley into partnership in the business with him, then the like account as regarded the plaintiff Shipley, and an account of the stock in trade, monies, securities, and other estate and effects of the testator, possessed by the defendant Samuel Smith either as partner with the testator in

his lifetime, or as one of his executors since his death, and also praying an injunction. That the cause [this was the cause of *Garsted v. Smith*.—See subsequent page.] was heard by the Vice Chancellor, in April, 1834, when an order was made dismissing the bill; but directing that the costs of all parties as between solicitor and client should be paid out of the testator's estate. That the plaintiff Todhunter, and certain of his co-plaintiffs in the present suit, were exceedingly dissatisfied with the said decree. That, by an order of the Master of the Rolls, made in the said cause of *Garsted v. Smith*, dated March, 1836, it was ordered, that the plaintiff Todhunter, and the said other co-plaintiffs, should be at liberty to use the names of the defendants *Garsted* and *Smallfield*, [the plaintiffs in the said cause of *Garsted v. Smith*,] in any proceedings that the plaintiff Todhunter and the said co-plaintiffs might be advised to take for appealing from the said decree.* The affidavit then stated, that the object of delaying the proceedings in the suit was to stay the receipt by the said defendant Samuel Smith and the plaintiff Shipley of their legacies under the said will, in order that, in the event of relief being obtained in the said other suit, [*Garsted v. Smith*,] against the said defendant Samuel Smith and the plaintiff Shipley, there might be in the control of the Court some funds of the defendant Samuel Smith and the plaintiff Shipley applicable in satisfaction of such relief as might be decreed to the plaintiff Todhunter and his aforesaid co-plaintiffs.

The Vice Chancellor made the following order :—

17th Dec. 1838, V. C. * *—Whereas Mr. Jacob and Mr. Stevenson, of counsel for the abovenamed plaintiff Samuel Smith Shipley, this day moved and offered divers reasons unto this Court that the abovenamed plaintiffs, John Miller and Mary his wife, Martha Fenny, Newcome Smith, Eliza Smith, Benjamin Todhunter and Ann his wife, Henry Moore and Eliza his wife, might be ordered, in conjunction with the said Samuel Smith Shipley, to proceed with and prosecute the suit; or that it might be ordered that the conduct of this cause might be given to the said Samuel Smith Shipley, and that the costs of this application on behalf of the said plaintiff Samuel Smith Shipley might be costs in the cause, in the presence of Mr. Anderdon, of counsel for all the other plaintiffs, and Mr. Moore, of counsel for the defendants George Smallfield and Edward Garsted, two of the executors. Whereupon, and upon

* See the case of *Garsted v. Smith*, reported in a subsequent page of this volume.

hearing an affidavit, &c. read, and what was alleged by the counsel on both sides, this Court doth order, that the plaintiff Samuel Smith Shipley have the conduct of this suit, he submitting to such order as the Court may make as to future costs of the cause. And it is ordered that the other plaintiffs, when they shall have presented a petition of appeal in the cause of Garsted v. Smith, be at liberty to apply to the Court as they may be advised. And it is ordered, that the plaintiff Samuel Smith Shipley do pay to the defendants George Smallfield and Edward Garsted their costs of this application. And it is ordered, that the other plaintiffs do pay to the plaintiff Samuel Smith Shipley his costs of this application, such several costs to be taxed by the Master of this Court in rotation, in case the parties differ about the same.—Reg. Lib. B. 1838, fol. 170.

Bray v. Woodhouse.

V. C.
May, 1821.
After cause
set down and
subpœna to
hear judgment
served, plaintiff
dies, and cause
goes out of
the paper.
Revivor and
cause re-
stored. Ob-
jection, that
fresh sub-
pœna to hear
judgment ought
to have been
served over-ruled.

After cause set down and subpœna to hear judgment served plaintiff died, and the cause consequently went out of the paper; bill of revivor was then filed by the executor, and there was an order of course to revive, and the cause was restored to the paper. An objection, that a fresh subpœna to hear judgment ought to have been served, was, after inquiry into the practice, over-ruled,

Cockburn v. Raphael.

V. C.
Nov. 1830.
Defendant
dies after
cause set
down and
subpœna to
hear judgment
served :
Suit revived
against his re-
presentative;
there should be
fresh subpœna
to hear judgment.

Sir L. Shadwell.—Defendant dies after cause set down and subpœna to hear judgment served; bill of revivor filed against his personal representative, and the suit revived by order of course—there should be a fresh subpœna to hear judgment.

Pyne v. Puller.

L. C.
March, 1801.
One of several
defendants
dying after
cause set
down and
subpœna to
hear judgment
served.

Lord Loughborough.—One of several defendants dying after cause set down and subpœna to hear judgment served, the plaintiff, the cause being revived, must serve the representative of such deceased defendant with new subpœna to hear judgment, but the other defendants are bound to appear upon the old subpœna, they being informed that the cause has been revived and restored to the paper.

Colebrooke v. Randle.

Sir L. Shadwell.—There are cases in which there having been abatement and revivor after the service of the subpoena to hear judgment, it would be difficult to hold that the Court could regularly act upon an affidavit of a party having served, or having been served with, such subpoena only.

V. C.
Dec. 1830.
Abatement
and revivor
after service
of subpoena
to hear
judgment.

Ainslie v. Price.

Sir J. Leach.—Plaintiff who has served, or defendants who have been served with, subpoena to hear judgment, should the cause not be heard, but for any reason adjourned, must, being informed thereof, give attention to the cause whenever again regularly brought into the paper.

V. C.
June, 1818.
Subpoena to
hear judgment
and
cause adjourned.

Hern v. Robson.

Sir J. Leach.—A suit, by reason of an abatement or other defect, goes out of the paper, but the subpoena to hear judgment is still efficacious; and the suit having been revived, or other defect supplied, any party may apply to have it restored to the paper; and the other parties, having notice, are bound to attend; or, if they absent themselves, it is at the peril of consequences, differing in no respect from those incurred where the subpoena to hear judgment has been duly served, and there having been no abatement, or other defect, the cause has never left its original place in the paper.

V. C.
May, 1818.
A suit by
reason of
abatement
or other defect
goes out of
the paper—
The subpoena
to hear judgment
is still
efficacious.

Glegg v. Ball.

Sir J. Leach.—Cause standing over, with liberty to amend by adding parties, the new defendants only need be served with subpoena to hear judgment. The old defendants should, however, have reasonable and proper notice of the cause as to them having been again placed in the paper for hearing.

V. C.
Dec. 1819.
Subpoena to
hear judgment,
cause standing
over, with
liberty to
amend by
adding parties.

V. C.
May, 1830.

Several defendants, and plaintiff does not appear at hearing, and one defendant only produces affidavit of having been served with subpoena to hear judgment.

Smith v. Wilson.

There being several defendants, and plaintiff not appearing when cause was called on for hearing, and one defendant only producing to the Registrar affidavit of having been served with subpoena to hear judgment, bill, as to him, dismissed with costs. As to the other defendants no order made, but cause struck out of paper.

L. C.
Pasch. 1706.

Bill to revive, brought by devisee of plaintiff.

Dane v. Worthall.

Lord Cowper.—Plaintiff in suit dying, his devisee brings bill to revive. This is an original bill, in the nature of a bill of revivor, and the suit cannot be revived by motion, but there must be a hearing and a decree to revive.

V. C.
Nov. 1821.
Revivor by motion. Revivor by decree.

Humphreys v. Wallis.

Sir J. Leach.—Where the bill is a bill of revivor, you revive by motion of course; but where it is an original bill in the nature of a bill of revivor, or a supplemental bill in the nature of a bill of revivor, you revive by decree.

M. R.
Dec. 1833.

Where during abatement proceedings have inadvertently taken place.

Curling v. Perry.

Sir J. Leach.—Where during abatement proceedings have inadvertently taken place, the bill should be one of revivor and supplement. You should state those proceedings by way of supplement, and then pray to have the benefit of them, and, in general, there will be a decree to that effect.

V. C.
Dec. 1818.
Lunatic's suit—Committee dies—New committee.

Re Smythe, a Lunatic.

Lord Eldon.—Where a suit is pending by a lunatic and his committee, and the latter dies, the new committee continues the suit by filing a short supplemental bill, stating his appointment to the office.

L. C.
1737.
Supplemental bill must not altogether change the issue.

Brown v. Hickson.

Lord Hardwicke.—Supplemental bill must not *altogether* change the issue upon which the original bill places the plaintiff's title to the equitable relief.

The Attorney General v. Fishmongers' Company.

Lord Cottenham.—What did the Vice-Chancellor mean by stating, in *Colclough v. Evans*,* that the supplemental bill could not be filed without leave, because it sought to change completely the issue raised by the original bill?

because it sought completely to change the issue.

L. C.
July, 1838.
Question as to the meaning of a dictum, that supplemental bill could not be filed without leave,

Attorney General v. Fishmongers' Company.

Lord Cottenham.—Is there any case, besides *Colclough v. Evans*, in which, with reference to supplemental bills filed, stating facts existing when the suit was commenced, but which it was too late to bring forward by amendment, a distinction has been drawn between facts changing and facts not changing issues, raised by the original bill?

by amendment—as to distinction having been drawn between facts changing and facts not changing issues.

L. C.
July, 1838.
Question with reference to supplemental bill filed, stating facts existing when the suit was commenced, but which it was too late to bring forward not changing

Walker v. Jones

Sir L. Shadwell.—In the case before me of *Colclough v. Evans*, a fact at variance with the statement in the original bill had been discovered after replication filed, but it was not too late for a special application to amend under the New Orders [15 Gen. Ord. April, 1828, since rescinded]; and considering the peculiar nature of the fact, for it was that upon which I mainly went, I thought (whether rightly or wrongly, I know not) that the plaintiffs ought not in that case to have filed the supplemental bill, but that they ought to have made a special application for liberty to withdraw the replication and amend the original bill; and, therefore, although under the particular circumstance I allowed the demurrer to the supplemental bill, I gave the plaintiffs leave to make an application that they might withdraw the replication to the answer and amend the bill.

V. C.
Nov. 1848.
The Vice Chancellor states why he allowed the demurrer in *Colclough v. Evans*, 4 Sim.

Hawkhurst v. Cook.

Lord Hardwicke.—Mesne process against defendant to enforce answer, and defendant dies, the mesne process is abated.

L. C.
1747.
Mesne process, and defendant dies—the process abates.

* 4 Sim. 76.

SEQUESTRATION.

Defendant dies—when sequestration dies with him—when it does not die with him.

Defendant dying, sequestration, if it be to enforce an answer and the like, dieth with him, for the thing could be done only by the defendant himself; but not so if sequestration issued for some other default, as for non-payment of money, as that may be equally performed by the executors having assets. So the duty, for neglect of which the process is taken out, should be attended to and duly distinguished.—Old MS. Notes of Chancery Practice.

L. C.
1751.

Price v. Lloyd.

When want of parties no objection to bill of revivor.

Lord Hardwicke.—A defect for want of parties is no objection to a bill of revivor, if the defect be one existing in the original bill.

L. C.
1747.

Petrie v. Robson.

Depositions taken during abatement.

Lord Hardwicke.—Depositions taken during an abatement are good, if the commissioners and parties knew nothing of the abatement.

L. C.
Mich. T. 1727.
Where decree orders payment of money to a party, the death of other parties does not in general prevent him from receiving it.

Winchelsea v. Finch.

Lord King.—Where decree orders payment of money to a party, the death of other parties does not in general prevent him from receiving it. It is the daily practice to order money out of Court in such circumstances. It was so before the Accountant-General's office was made, and it is so since.

L. C.
1735.

Whitehead v. Huggins.

When defendant is at liberty to procure order to revive.

Lord Hardwicke.—Suit abating after decree, and plaintiff filing bill of revivor but not procuring an order to revive, the defendant is at liberty to procure such order.

L. C.
August, 1747.
Order upon notice—the plaintiff having examined a witness for him who was a person of

Gill v. Watson.

Saturday, 8th August, 1747.—Lord Chancellor. William Gill, Plaintiff; Christopher Watson, Elizabeth Gaines, widow, and others, defendants.—Upon opening of the matter, this present day unto this Court by Mr. Clarke, [afterwards Master of the

Rolls], of counsel with the defendants, it was alleged that the plaintiff hath examined one Miles Allanson as a witness for him in this cause, who is a person of ill fame; and the defendants have exhibited articles in the Examiner's office touching the credit of the said Miles Allanson, and therefore it was prayed that the defendants may be at liberty to exhibit interrogatories for the examination of witnesses in support and proof of the said articles, and that a commission may issue for that purpose, and that the plaintiff's clerk in court may join and strike commissioners' names with the defendant's clerk in court, in four days after notice, or in default thereof that the defendants may have such commission directed to their own commissioners, which upon hearing of Mr. Waller, being of counsel with the plaintiff, and several affidavits read, is ordered accordingly — Reg. Lib. A. 1746, fol. 479.

ill fame, and the defendants having exhibited articles in the examiner's office touching the credit of such witness, that the defendants might be at liberty to exhibit interrogatories in support of such articles, and that a commission might issue.

May v. Hooper.

Sir Lancelot Shadwell.—Under the General Order of the 5th of August, 1818, application should be made for the costs of an abandoned motion on the day, or one of the days on which, according to the notice and course of the Court, it ought to be moved, supposing the state of business to present no impediment, unless expressly saved, or for any reason adjourned; and then on the day for or to which it has been so saved or adjourned.

V. C.
Dec. 1831.

When application should be made for the costs of an abandoned motion.

Maples v. Burn.

Sir Lancelot Shadwell said he had reason to think that the power given to the Court by the General Order of August, 1818, of directing upon production of the notice of an abandoned motion, what sum shall be paid for the costs of it, where an affidavit is filed by either party, was not intended to be exercised, except in a very plain case.

V. C.
June, 1828.

Power given by General Order, Aug. 1818, of directing what sum shall be paid for costs of abandoned motion.

Warner v. Armstrong.

Sir Lancelot Shadwell.—If a plaintiff gives a notice of motion, and dies before it is made, and his executors revive the suit, but abandon the motion, they are not liable to the costs of an abandoned motion, under the General Order of the 5th of August,

V. C.
Feb. 1831.

Plaintiff gives notice of motion and dies before it is made, and his executors revive the suit but abandon the motion.

1818. That order applies only to the parties actually giving the notice. The hardship now complained of, seems to require that the General Order should be extended.

M. R.
Nov. 1835.
Costs of an
abandoned
motion not
costs in the
cause.

Lewis v. Armstrong.

Sir C. C. Pepys.—A party cannot have the costs of an abandoned motion, unless he avail himself of the General Order of the 5th August, 1818. Such costs have never been and are not now costs in the cause. The costs must be obtained at the time of the abandonment of the motion. They cannot be had afterwards, unless under some special circumstances.

V. C.
Jan. 1818.
Partner with-
out consulting
his co-part-
ners bringing
an action or
instituting a
suit in the
name of the
firm.

Simpson v. Simpson.

Sir John Leach said that a partner has, without consulting his copartners, brought an action or instituted a suit in the name of the firm, is no misconduct, unless the articles of partnership require their previous consent. In the case of an action, a Court of Common Law would not stay proceedings; and in the case of a suit, this Court would not, as he apprehended, intermeddle, at least as long as the partnership existed.

Remarks.

In *Collett v. Hubbard*,* Lord Cottenham said, that another reason urged for the dissolution of the injunction was, that the suit had been instituted, and the injunction had been obtained, without the knowledge, concurrence, or sanction of the plaintiff Collett's partner, the plaintiff Hubbard, and circumstances were detailed in the affidavits filed on the part of the defendants Hubbard to induce the Court to arrive at that conclusion. That, however, evidence that the co-plaintiff disapproved of the bringing of the present suit against the defendants Hubbard, his father and brother, was unimportant. That the plaintiff Hubbard might release them if he pleased from all liability, but unless he did that, the plaintiff Collett had a right, the partnership existing, to prosecute the suit. That it was possible that the plaintiff Hubbard might condemn the proceedings, but the plaintiff Collett was only doing what lay entirely within his authority as partner. That the plaintiff Hubbard could not prevent steps of this kind being taken by his partner, the plaintiff Collett, so long as the partnership continued, much less could any third party interfere. That it was a general rule of law, that one partner may, without the consent of his copartner, institute legal proceedings against a debtor to the firm.

* 2 Rep. temp. Cott. 94.

The foregoing dicta of Sir John Leach in the present case, taken down by the author soon after he was called to the bar, and the observations of Lord Cottenham in *Collett v. Hubbard*, seem to correspond. But consider the case of *Keppell v. Bailey*, [Lord Brougham's MSS.] reported in a subsequent page of this volume.

Payne v. Owen.

V. C.
Nov. 1828.

Sir John Leach.—Where a bill is ordered to be taken off the file, on the ground that the solicitor had no authority to file it, I am of opinion that the proper order is, that the costs of filing the bill be paid by the solicitor who filed the same, and that the costs of the defendants should be paid in the first instance by the plaintiff, and then that the solicitor should repay such costs to the plaintiff. This is in a case where no doubt is suggested that the plaintiff would be able to recover from the solicitor the costs which shall be so paid to the defendants. What ought to be done in a case where, from the solicitor having absconded, or from other circumstances, it is plain there is no chance of the unfortunate plaintiff, whose name has been improperly used, recovering any costs at all does not seem to have been determined. It by no means seems clear that in those circumstances he ought to be ordered to pay to the defendants their costs. Is it not a common misfortune that has befallen the plaintiff and the defendants? Lord Eldon did not determine any such point in *Wade v. Stanley*.* Indeed, from the order, he does not appear even to have determined that the solicitor should repay to the plaintiff, whose name he had used without authority, the defendant's costs of the application, and which costs such plaintiff was nevertheless ordered to pay. Where, however, there is no suggestion that the solicitor is not of ability to pay all the costs, the Court can have no hesitation as to the form of the order to be made.

Where bill ordered to be taken off the file on the ground that the solicitor had no authority to file it, the proper order is, that the costs of the defendants shall be paid in the first instance by the plaintiff, and then that the solicitor who filed the bill shall repay such costs to the plaintiff—What ought to be done in a case where, from the solicitor having absconded or from other circumstances, it is plain there is no chance of the plaintiff, whose name has been improperly used, recovering any costs at all, does not seem to have been determined.

In *Martindale v. Lawson*† there was a motion on the part of the plaintiffs, that the bill might be taken off the file at the cost of Mr. Thomas Dixon, the solicitor, who had filed it without their authority. The following was the order: This Court doth order that the bill filed in this cause be taken off the file; and it is ordered, that the costs of filing such bill be paid by Mr. Thomas Dixon, the solicitor who filed the same; and it is ordered that it be referred to the Master of this Court in rotation to tax the defendants their costs of this suit up to this day, and of this appli-

* 1 Jac. & Walk. 674.

† 1 C. P. Coop. 83.

cation, and consequent thereon, and also to tax the plaintiffs their costs of this application; and it is ordered that the costs of the said defendants, when taxed, be paid in the first instance by the plaintiffs; and it is ordered, that the said Mr. Thomas Dixon pay to the plaintiffs their said costs, when taxed, and also the said costs of the said defendants so to be paid in the first instance by the plaintiffs.

V. C.
July, 1819.
A prudent creditor upon whose debt the Statute of Limitations has nearly run, will file his own bill or bring his action.

Quelman v. Long.

Sir John Leach.—A prudent creditor, upon whose debt the Statute of Limitations has nearly run, will file his own bill, or bring his action, and not trust to a creditors' suit, in which he is not a co-plaintiff,—over which he has no control, and in which a decree has not been and possibly never may be made.

Remarks.

An unsuccessful search has recently been made in the Registrar's Book for any decree or order in this cause.

See a subsequent page of the present volume.

V. C.
July, 1820.
The Statute of Limitations having run upon a debt before the date of the decree in a suit by legatees.

Bird v. Currie.

Sir John Leach.—The Statute of Limitations having run upon a debt before the date of the decree in a suit by legatees, and not by creditors on behalf of themselves and all other creditors, the creditor is barred. The usual advertisement for creditors in a legatees' suit cannot have the effect of reviving a debt of that kind. Such advertisements sometimes appear a quarter of a century after the death of the testator, and are only intended to apply to debts which have been kept alive by payment of interest or some legal acknowledgment.

Remarks.

Search has been lately made in the Registrar's Book for any decree or order in the case of *Bird v. Currie*, but as in the instance of the preceding case of *Quelman v. Long*, without success. The foregoing passages can therefore be regarded only as dicta taken down by a practitioner, at that time young, the value of which, perhaps, future decisions alone can determine. The point is one upon which the author finds that much discrepancy of opinion exists. The insertion of the dicta in this place is a sufficient indication in what direction his own opinion tends.

See a subsequent page of the present volume.

House of
Lords.
July, 1804.
MS. Notes of
Lord Eldon's
Remarks—
Husband and

Lashley v. Hogg.

Lord Chancellor Eldon.—Husband and wife, being aliens, abandon their own country and settle here. They become do-

CHANCERY
CASES AND DICTA,

ALSO

NOTES FROM MSS.

ANCIENT AND MODERN,

WITH OCCASIONAL REMARKS;

AND

Chancery Miscellanies.

CHANCERY CASES AND DICTA,
No. II.

BY

CHARLES PURTON COOPER, ESQ.,

ONE OF HER MAJESTY'S COUNSEL.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Booksellers and Publishers.

1852.

[*Price Sixpence.*]



miciled in London, and then the husband dies. In the absence of any contract the law of England shall regulate the rights of the widow in the goods of the deceased husband. If there is a contract, the goods must be distributed according to the terms of such contract. The validity and effect of the contract is a question of foreign law. The contract, if one exist, must be wholly governed by the law of the country in which it was made.*

country the contract, if one exists, is to be governed.

II.

Hog v. Hog.

Lord Eldon.—Covenant in consideration of marriage to settle by will all the covenantor's estate upon husband and wife, and the issue of the marriage, may be defeated by the covenantor's extravagance, which leaves no subject for the covenant to act upon, but not by any voluntary disposition made in order to avoid the effect of the covenant. That is a kind of fraud which a Court of Equity will not allow.

House of Lords.
May, 1802.
MS. Notes of Lord Eldon's Remarks—
Covenant, in consideration of marriage, to settle by will, may not be defeated by any voluntary disposition made to avoid the effect of the covenant.

Walker v. Christian.

Wednesday, 18th March, 1835.—James Alexander Walker, Paul Augustus Roussac and Charles Francis Dumaine, plaintiffs; Deer Christian, defendant.—Upon opening of the matter this present day unto this Court by Mr. Richards, of counsel for the plaintiffs, it was alleged, that it appears by the affidavit of William Little, that the said plaintiffs trade at Calcutta, as merchants, under the firm of Walker, Roussac and Co. That he verily believes that the said plaintiffs, during the year 1834, were engaged in very extensive mercantile transactions with the said defendant, and that he received large sums of money in the course of such transactions, and the plaintiffs also paid large sums of money on the defendant's account; and that in the course of such transactions, and on a fair and just account thereof being made up, stated and settled between the said plaintiffs and the said defendant, the said defendant has become indebted to the said plaintiffs in the sum of 4000*l.* and upwards, as appears by certain accounts transmitted by the said

V.C.
March, 1835.
Ne exeat regno.
Plaintiffs, being merchants at Calcutta, obtain the writ against defendant, with whom they were engaged there in extensive mercantile transactions, and who having come from thence to England was about to proceed to Prussia.

* See a subsequent page.

plaintiffs to the deponent and his partner, who are the agents of the said plaintiffs in England, and which accounts the deponent verily believes to be true, touching which accounts the said deponent saith the said plaintiffs have filed their bill in this court. That the said Deer Christian, about ten days or thereabouts last past, arrived in this country from Calcutta under the assumed and false name of Francis Clarke, and the said deponent's firm, a few days after the arrival of the said Deer Christian, received from the said plaintiffs at Calcutta information, which the deponent verily believes to be true, that the said Deer Christian had clandestinely quitted Calcutta with a quantity of sovereigns and gold mohurs and bills of exchange, and had secretly gone on board a ship about to sail for England, under the said false name, for the purpose of avoiding to account or come to any settlement of accounts with the said plaintiffs. That a diligent search has been made for the said Deer Christian, and that the said Deer Christian has, since his arrival, concealed himself under the said false name, and has been attempting to realise, and has, as the said deponent has been informed and believes, in part realised the property and bills of exchange which he has brought with him, and has made his preparations to go beyond the seas to the Continent or elsewhere out of the jurisdiction of this Court; and the deponent verily believes that the said Deer Christian has no relatives or connections in this country, and that, in case the said Deer Christian goes to the Continent as aforesaid and quits England, he will never return to this country or to Calcutta aforesaid, but that he will proceed to Prussia, where, as the deponent is informed and believes, his relations reside, and that the plaintiffs will thereby be in great danger of losing, and the said deponent believes they will lose, their said debt. To be relieved wherein, the plaintiffs have exhibited their bill in this court, as by the six clerk's certificate appears. It was therefore prayed that a writ of Ne exeat regno may issue against the said defendant until he shall appear to and fully answer the plaintiffs' bill, or the court make other order to the contrary, which is ordered accordingly, and the same is to be marked for security in the sum of 4000*l.* in words at length and not in figures.—Reg. Lib. B. 1834, fol. 378.

Remarks.

The foregoing order was discharged on the 31st March, the plaintiffs consenting. See a subsequent page of this work.

NE EXEAT REGNO.

LORD ELDON.—[Lincoln's Inn Hall, 1816].—A writ of Ne exeat regno cannot be supported upon evidence of intention to go abroad obtained subsequently to the period when the writ was issued.—MS. Notes.

L. C.
1816.

Writ of Ne exeat regno cannot be supported upon evidence of intention to go abroad ob-

tained subsequently to the period when the writ was issued.

In *Hyde v. Whitfield*,* Vesey, junior's, marginal note states that—Remarks.
“the defect in the plaintiff's affidavit, that it was not positive as to a declared intention to leave the kingdom, or circumstances amounting to it, but that it was only to information and belief of such intention, was not supplied by the avowal in the defendant's affidavit of his intention to return to his house of business in Jamaica.” There is not a word with reference to the passage in the judgment—“the ground on which the writ issues is always stated in the body of it, and if it issued improperly it ought to be discharged.” The student will, however, find that such passage contains the point. If the affidavit upon which the writ issued had stated an admission by the defendant that he was about to quit the kingdom for Jamaica, and there had been no other objection to the writ, it would not have been discharged.

Blaydes v. Calvert.

Lord Eldon.—Alimony and Account are the only exceptions to the rule that the writ of Ne exeat regno issues not unless the debt be merely equitable.

L. C.
Oct. 1820.

Ne exeat regno—Alimony and Account.

The ensuing remarks were written when the author was a student, four years before *Blaydes v. Calvert* † (he was the counsel who prepared the bill and made the different applications)‡ came before Lord Eldon.

In an *Anonymous* case in Atkyns,§ Lord Hardwicke said there is no instance of a writ of Ne exeat regno being granted where the demand is not a mere equitable demand, except in a single instance where the wife sues in the spiritual court for alimony and the husband threatens to leave the kingdom, and this is done out of compassion to the wife and to aid the spiritual court.

In *Pearne v. Lisle*, in Ambler,|| Lord Hardwicke, after saying that the rule of the court is not to grant a Ne exeat regno on a mere legal demand for money, added, that the almost only exception to the rule is in the case of alimony decreed by the Spiritual Court; that the Spiritual Court cannot take bail, and, therefore, the Court of Chancery will lend its assistance in favour of the woman.

The language of Ambler is more accurate than the language of Atkyns.

* 19 Ves. 342.

† 2 Jac. & Walk. 211.

‡ See a subsequent page of this work.

§ 2 Atk. 210.

|| Amb. 75.

Atkyns says "there is no instance of a writ of *Ne exeat regno* being granted where the demand is not a mere equitable demand, except in a single instance, where the wife sues in the Spiritual Court for alimony." Ambler says, "that the almost only exception to the rule of the court not to grant a *Ne exeat regno* for a mere legal demand for money is in the case of alimony."—The writ of *Ne exeat regno* may issue to secure the balance of an account. If account be not a mere legal demand, neither is it a mere equitable demand. Both Courts of Equity and Courts of Law have jurisdiction.

See 2 Rep. temp. Cott. 253.—Remarks of Lord Eldon upon the Writ of *Ne exeat regno* being applied to the case of Alimony. See also the next article.

NE EXEAT REGNO.—ALIMONY.

Question as to the principle upon which the Court grants the writ of *Ne exeat regno* in cases of Alimony. Remarks.

LORD THURLOW.—No aid has ever been here given to the Spiritual Court to enforce the actual payment of Alimony. Aid to the Ecclesiastical Court can hardly be the ground of granting the writ of *Ne Exeat* in such cases.—Old MS. note (1790).

In *Coglar v. Coglar*,* Lord Thurlow said he was afraid that the writ of *Ne exeat regno* upon a suit by the wife for alimony could not be granted under the notion of aiding the Ecclesiastical Court.†

Lord Eldon.—If, as Lord Hardwicke is reported to have said,‡ compassion is the ground upon which the issuing of the writ of *Ne exeat* in a case of alimony is to be supported, how

* 1 Ves. jun. 94.

Sequestration out of chancery under the act for enforcing the process upon contempts in the Ecclesiastical Courts.

† With reference to Lord Thurlow's remark in the old MS. note, that no aid had ever been given in Chancery to the Spiritual Court for enforcing the actual payment of alimony, it may be useful to remind the student, that by the 2nd & 3rd Will. 4, c. 93 [An Act for enforcing the Process upon Contempts in the Courts Ecclesiastical of England and Ireland], s. 2, it is enacted that in all cases in the Ecclesiastical Courts, when any persons shall have been ordered to pay any sum of money and shall refuse or neglect to pay the same, it shall be lawful for the Ecclesiastical judge to pronounce such person contumacious, and to cause a copy of the order to be certified to the Lord Chancellor, and the Lord Chancellor shall forthwith cause such copy of such order to be enrolled, and shall thereupon cause process of sequestration to be issued against the real and personal estates of the party against whom such order shall have been made, and it shall be lawful for the Lord Chancellor to make such order in respect of such sequestration as he shall think fit, or for payment of the monies levied by virtue thereof, into the Bank of England, with the privity of the Accountant-General of the Court of Chancery, to the credit of the party who shall have obtained such order.

‡ See the preceding page.

does it happen that in other cases compassion is not relied upon as the ground of equitable interference? MS. note (1802).

In *Shaftoe v. Shaftoe*,* Lord Eldon said that in granting the writ he Remarks. was more influenced by authority than principle; and in *Dawson v. Dawson*,† he said it was a strange thing to apply the writ to alimony.

See the preceding case.

NE EXEAT REGNO.

See *Moore v. Hudson*.‡ Ne exeat regno granted upon ex parte Some Ne exeat regno cases. application, defendants having sold out stock which, upon motion after decree, had been ordered to be transferred into the name of the Accountant-General. Writ issued upon affidavit of plaintiff's solicitor that he had been informed, and which information he believed to be true. Writ or writs to issue, the plaintiff undertaking not to execute more than one of the said writs.—*Collinson v. Wattleworth*.§ Ne exeat regno granted, upon ex parte application, after decree for account, upon Master's report of balance. Writ issued upon affidavit—not being that of the plaintiff—of information received from the defendant's wife and daughter. In applications for writ of Ne exeat, suggestion as to the Court acting upon information derived from the wife—the wife not giving it for the purpose of enabling a party to prove that her husband intends to quit the country. Affidavit states deponent believes that it was the intention of the defendant to go and reside out of the jurisdiction to avoid the process of the Court, and the payment of the money sought to be recovered by the plaintiff.—*Roebuck v. Roebuck*.|| Writ of Ne exeat regno upon bill filed by the wife against the husband—a quarter's arrear and upwards of her alimony of 150*l.* a year being unpaid, and a suit having been instituted by her for an increase of alimony. Order that the writ should be marked in the sum of 600*l.* and upwards. Remarks of Lord Eldon upon the writ of Ne exeat regno being applied to the case of alimony.—*Goodwyn v. Clark*.¶ Ne exeat regno in suit for specific performance by vendors against purchaser. Purchase-money unpaid 2000*l.*, and the writ marked for 300*l.* only.—*Taylor v. Leitch*.** Ne exeat regno in suit by infants entitled to their mother's residue, against one of the executors, upon affidavit that he had signed an account,

* 7 Ves. 171.

† Ibid. 173.

‡ 2 Rep. temp. Cott. 245.

§ Ibid. 247.

|| Ibid. 251.

¶ Ibid. 253.

** Ibid. 256.

and agreed to be charged with the balance, and that he designed to leave the realm and reside in Scotland or elsewhere out of the jurisdiction.—*Knight v. Watts*.^{*} Writ of Ne exeat regno upon affidavit that all the household goods and furniture of the defendant were sold and his house was uninhabited, and that he had absconded, and that his agent had said, that unless the plaintiffs would take a certain assignment [as security], and give the defendant a discharge for all the moneys he had received, he would immediately go abroad, and either take with him the deeds, writings, and books of account belonging to the estate of which one of the plaintiffs was administratrix, or would burn and destroy the same.—There is a somewhat curious case of Ne exeat in the reign of Philip and Mary, *De Swigo v. Van Affren*.[†] Decree and order in pursuance of an award of two Commissioners of the Court, that the plaintiff should deliver to the defendant at Venice, a bed of crimson velvet, with the richly embroidered furniture thereof, and that the plaintiff should pay to the defendant all money due by force of that award, and that a writ of supersedeas should issue to discharge a writ of Ne exeat regnum and the bonds thereupon taken, so that the defendant might be at liberty to travel out of the realm into foreign parts, in such wise as he might have done before the granting of the said writ.

V. C.
1827.

APPEAL OR RE-HEARING FOR COSTS.

One exception now well established to the rule that there can be no appeal or rehearing for costs only—is where there is an estate or fund

Sir Anthony Hart.—The large amount of costs since stamps were introduced has occasioned several exceptions to the rule that there can be no appeal, no re-hearing for costs only. One exception, now well established, is where there is an estate or fund out of which the costs are directed to be paid.

V. C.
March, 1818.
One of several plaintiffs, before decree, gives notice to the solicitor not to proceed any further in the suit.

Perkins v. Perkins.

Sir John Leach.—If one of several plaintiffs, before decree, gives notice to the solicitor not to proceed any further in the suit, that is a good ground for the co-plaintiffs coming to the Court and asking for an order that the bill may be amended by making the plaintiff who has given the notice a defendant.

^{*} 2 Rep. temp. Cott. 257.

[†] Ibid. 259.

In *Brown v. Sawyer** the Master of the Rolls said, the plaintiff who had in this case given written instructions to his solicitor, afterwards revokes the authority and prevents the other plaintiff going on with the suit. The case is within the words of the authority cited (*Attorney-General v. Cooper*)†. "The suit cannot be prosecuted unless the alteration is made, and, therefore, justice will not be done unless the alteration is made."

Smith v. Smith.

Sir John Leach.—The majority of these plaintiffs having, as it is suggested, come to some understanding with the defendants, have given their solicitor notice not to prosecute this decree for an account. The minority of the plaintiffs are still desirous that the decree should be prosecuted. The solicitor hitherto employed by the plaintiffs, apparently doubting the result of the suit, and the ability of the minority to pay his bill of costs, declines to proceed, and thus throws upon the minority of the plaintiffs the necessity of taking some proceeding. I am of opinion that the proper proceeding is a supplemental bill, which should state that the majority will not concur with the minority in the prosecution of the decree. The minority will be plaintiffs in such supplemental bill and the majority must be defendants. The present defendants must also be defendants to such supplemental bill. The course is analogous to that which is pursued where one of several plaintiffs dies, or becomes bankrupt, or insolvent, and the personal representatives or assignees decline to join with the surviving or solvent plaintiffs in filing a bill of revivor or supplement. There the surviving or solvent plaintiffs file a bill of revivor or supplement against the personal representatives or assignees and the defendants. The decree upon a supplemental bill by the minority of the plaintiffs against the majority, and the defendants, will also be analogous to that which the court makes upon a bill of revivor or supplement filed by the surviving or solvent plaintiffs against the personal representatives of the plaintiff dying, or the assignees of the plaintiff becoming bankrupt or insolvent, and the defendants; liberty is given to prosecute the original decree. But these parties had better come to some arrangement. This court will not allow the majority of the plaintiffs to prevent the minority

V.C.
Nov. 1819.
Majority of
the plaintiffs
give their so-
licitor notice
not to prose-
cute the de-
cree.

* 3 Beav. 598.

† 3 Myl. & Cr. 258.

having the benefit of this decree for the purpose of ascertaining whether there is or not anything coming to them from the defendants.

Remarks.

The case of
Pycroft v.
Gregory, 1
C. P. Coop.

In the margin of the author's MS. is a note that no supplemental bill was filed, the solicitor eventually agreeing to prosecute the decree on behalf of the minority of the plaintiffs, and the minority of the plaintiffs undertaking to indemnify the majority against any liability to which they might be subject, by reason of the continued use of their names.

In *Pycroft v. Gregory** the bill was filed for the administration of an estate. One of the parties interested had become a bankrupt, and his assignee had been made a co-plaintiff without his knowledge. A decree had been already pronounced in the cause when the assignee, having been accidentally apprised of its existence and not being disposed altogether to repudiate the suit, moved that notice might be given to him of all future proceedings, and that he might be at liberty to appear in them by his own solicitor. Sir John Leach.—What this plaintiff desires would be a great increase of trouble and expense, not merely to the other plaintiffs, but to the defendant also, besides being productive of other inconveniences. I hardly know how such an order could be made, were it even proposed (which it is not), that all the other parties in the cause should be indemnified against the extraordinary costs to which they would be put. It is possible the expense might not be greater in this case than if this plaintiff was made a defendant, when, of course, he would have a right to be represented by his own solicitor. But the mode of conducting a suit in the offices is not adapted to the employment by plaintiffs of separate solicitors. It sometimes does occur that upon the hearing of a cause the plaintiffs are discovered to have conflicting interests, and the Court occasionally desires that separate counsel should be instructed to argue particular points; but even then the same solicitor continues to act for all the plaintiffs. If the interests of co-plaintiffs cannot be entrusted to the same solicitor, the proper course is to apply that some should be made defendants.

As the decree had been already pronounced in this case of *Pycroft v. Gregory*, it is obvious where it is said the expense possibly might not be greater than if the plaintiff was made a defendant, it must have been meant if he was made a defendant by supplemental bill. So the decree having been already pronounced, it is obvious where it is said, that if the interests of co-plaintiffs cannot be intrusted to the same solicitor, the proper course is to apply that some should be made defendants, it must have been meant that the proper course was to apply by supplemental bill that some should be made defendants. There could, in that stage of the cause, be no order to amend consistently with the practice of the Court for the last century.

* 1 C. P. Coop. 498.

It appears from some notes of this case of *Pycroft v. Gregory*, which the author has preserved, that it was the plaintiff, John Pycroft, assignee of the estate and effects of James Pycroft, upon whose behalf the motion was made. There was an order on further directions in 1827, and a rehearing of that order in 1829. See 4 Russ. 526. Upon reference to the Registrar's book, it will be found that the plaintiff, John Pycroft, still preserved his character of plaintiff throughout all the proceedings. Unless he altogether adopted the suit, it is probable that he was indemnified by the co-plaintiffs or some of them.

Clegg v. Lee.

Sir John Leach.—The general rule in interlocutory proceedings is, that costs of a successful application, and costs of a successful opposition, are costs in the cause.

V.C.
July, 1819.
Costs in the cause. Interlocutory proceedings that are successful.

Green v. Fuller.

Sir John Leach.—In general the Court does not give the defendant his costs of a successful motion to dissolve an injunction, whether special or common. The defendant will, however, have such costs as costs in the cause if the plaintiff fails in the suit, and his bill is dismissed with costs.

V.C.
July, 1823.
Defendant's costs of successful motion to dissolve injunction.

Rawlins v. Halifax.

Sir John Leach.—A defendant shall forthwith have his costs of a successful motion to dissolve a special injunction, where the plaintiff obtained the injunction only by means of some misrepresentation, concealment, or surprise; where the Court was plainly deceived by him.

V.C.
March, 1824.
Where defendant shall forthwith have his costs of successful motion to dissolve special injunction.

Lewis v. Bridger.

Sir L. Shadwell.—The costs of a petition or motion, or other interlocutory proceeding, that fails, are not costs in the cause, unless the Court so directs.

V.C.
Jan. 1830.
Costs in the cause. Interlocutory proceedings that fail.

COSTS IN THE CAUSE IN CERTAIN INJUNCTION CASES.

Plaintiff applies for injunction and succeeds. Plaintiff succeeding in the suit also, his costs of application for the injunction are costs in the cause.

Costs in the cause in certain injunction cases.

Plaintiff applies for injunction and fails. Plaintiff failing in the

suit also, defendant's costs of resisting the application for injunction are costs in the cause.

Plaintiff applies for injunction and succeeds; but eventually fails in the suit. Defendant's costs of resisting the application for injunction are not costs in the cause.

Plaintiff applies for injunction and fails; but eventually succeeds in the suit. His costs of the application for the injunction are not costs in the cause.

Defendant applies to dissolve injunction and succeeds, and plaintiff fails in the suit. Defendant's costs of application to dissolve are costs in the cause.

Defendant applies to dissolve injunction and fails, and plaintiff succeeds in the suit. Plaintiff's costs of resisting the application to dissolve are costs in the cause.

Defendant applies to dissolve injunction and succeeds; but plaintiff eventually succeeds in the suit. The plaintiff's costs of resisting the application to dissolve are not costs in the cause.

Defendant applies to dissolve injunction and fails; but plaintiff eventually fails in the suit. The defendant's costs of the application to dissolve are not costs in the cause.—Old MS. Notes of Practice.

V. C.
1824.
Costs in the
cause. Ap-
peal.

COSTS IN THE CAUSE—APPEAL.

Sir J. Leach.—Where an appeal is successful, the costs of those who assail the decree or order, and the costs of those who defend it, are alike costs in the cause.

L. C.
1838.
Costs where
one of several
defendants
appeals.

COSTS WHERE ONE OF SEVERAL DEFENDANTS APPEALS.

Lord Cottenham.—Speaking generally, where one of several defendants appeals without success, he pays all the costs (those of the plaintiff and those of the other defendants); but where he appeals with success he pays no costs (neither those of the plaintiff nor those of the other defendants). Their costs are costs in the cause.*

V. C.
1819.
Gross sum for
costs.

GROSS SUM FOR COSTS.

Sir John Leach.—There can be no doubt the Court has jurisdiction to order a sum in gross to be paid for costs. In very an-

* See *Stocken v. Stocken*, and *Stubbs v. Sargon*, 1 C. P. Coop. 257.

cient times, as I am told, taxation of costs was unknown.*—
MS. Notes.

ONE OF SEVERAL DEFENDANTS APPEALS.

L. C.
1837.

Lord Cottenham.—Where there are several defendants similarly circumstanced and one only appeals, it by no means follows that the defendants not appealing will derive benefit from the success of the appealing defendant.†

One of several defendants appeals.

WHO CAN BE HEARD UPON AN APPEAL.

L. C.
1836.

Lord Cottenham.—Where there are several defendants, that defendant only who appeals from a decree or order can be heard against it. The other defendants can only be heard in support of it.‡

Who can be heard upon an appeal.

APPEAL FROM THE WHOLE DECREE—APPEAL FROM PART OF THE DECREE.

L. C.
1836.

Lord Cottenham.—When the appeal is from the whole decree there is no reason why the whole decree should not be open for the respondent as well as for the appellant; but where the appeal is from a specific part of the decree, it would often be productive of much inconvenience were other parts of the decree open to the respondent: the result would of course be, that they must be equally open to the appellant. The best course is, that the parties should present respectively their petitions of appeal, pointing out the particular parts of the decree with which they are dissatisfied.§

Appeal from the whole decree. Appeal from part of the decree.

OMISSION TO STATE IN AN ORDER APPEALED FROM THAT A PARTICULAR AFFIDAVIT WAS READ.

L. C.

Feb. 1847.

Lord Cottenham.—Upon appeal from an order, I can only look at the affidavits, which the order recites as having been used in the Court below; but where I am satisfied that a particular

Omission to state in an order appealed from that a particular affidavit was read.

* See *Slougham v. Tarnside*, 1 Rep. temp. Cott. 374.

† See *Tasker v. Small*, 1 C. P. Coop. 255; also 1 Rep. temp. Cott. 61.

‡ See *Tasker v. Small*, 1 Rep. temp. Cott. 61.

§ See *Smith v. Effingham*, and *Anon.* 1 Rep. temp. Cott. 61.

affidavit was actually used there, although from neglect or accident it is not noticed in the order appealed from, I shall not scruple to direct the appeal to stand over, to give an opportunity for an application to the Court, that the order may be altered by supplying the omission.*

Hoare v. Goodchild.

L.C.
Feb. 1847.
No second
rehearing of
interlocutory
application
unless upon
new facts.

Lord Cottenham.—There can be no second rehearing of an interlocutory application, whether by petition or motion, unless upon new facts.†

L.C.
Feb. 1847.
Right to
begin on ap-
peal to the
Lord Chan-
cellor.

RIGHT TO BEGIN ON APPEAL TO THE LORD CHANCELLOR.

Lord Cottenham.—In the House of Lords the appellant begins in all cases. In the Court of Chancery the appellant is entitled to begin in all cases except where the appeal is presented against the entire decree, made upon the original hearing of the cause. Where the appeal is presented against a part only of the decree made on the original hearing, or against the decree or order made upon the hearing on further directions, or against an order allowing or overruling a demurrer, or a plea or exceptions to the Master's Report—in all these cases the appellant is entitled to begin. It has sometimes occurred to me that it would be convenient were the practice of this Court assimilated altogether to that of the House of Lords in this matter. I recollect no case in which it would not have been more convenient, even where the appeal was from the entire decree on the original hearing, had the appellant begun.

Remarks.

See Right to begin on Appeal to Lord Chancellor, 1 Rep. temp. Cott. 68; Lord Lyndhurst's statement of the rule, *ibid.* 69. [See also *Bell v. Lord Mexborough*, *ibid.* 246.] The defendant appealing in substance from the whole decree, *ibid.* 66. Where the appeal was from an order allowing a demurrer, *ibid.* 70; where the appeal was from an order allowing a plea, *ibid.* 71. [See also *Andrews v. Lockwood*, *ibid.* 246.] Where the appeal was from an order allowing exceptions to Master's Report, *ibid.* 71. [See also petition in the nature of exceptions to the

* See *Tanner v. Carter*, 1 Rep. temp. Cott. 337.

† See *Bristowe v. Needham*, 1 Rep. temp. Cott. 226. See the author's remarks at the end of the report of the case of *Tanner v. Carter*, *ibid.* 338.

Master's Report, *ibid.* 67, 68]. Where the appeal was from an order on further directions, *ibid.* 72 and 247. Cause set down upon objection for want of parties, *ibid.* 66, 247, 330. Bankruptcy, *ibid.* 72.

WHEN PARTIES IN CONTEMPT CAN, AND WHEN THEY CANNOT,
BE HEARD.

See principal cases upon the question when parties in contempt can, and when they cannot be heard, 1 Rep. temp. Cott. 208—223. The marginal notes are as follows:—Lord Bacon's Ordinance.—General Doctrine.—Parties may be heard to get rid of the contempt and irregular proceedings connected with it.—Case of an outlaw.—A party, although in contempt, is entitled to appear and resist proceedings taken against him.—Where the party in contempt seeks other relief than what is merely defensive.—General rule that a party in contempt cannot come to take advantage of proceedings in the cause.—Proceedings for his own advantage, which it has been decided that a party in contempt may not take.—Proceedings for his own advantage, which it has been decided that a party in contempt may take.

When parties
in contempt
can, and
when they
cannot, be
heard.

The student and practitioner may consult also the following cases:—*Chuck v. Cremer*.^{*} In general a party in contempt cannot take a proceeding in the cause for his own benefit.—*Green v. Green*.[†] A party may be heard to show irregularities in the process upon which he is committed, although he has not obeyed the order in respect of which the process was issued.—*Ellice v. Walmsley*.[‡] A party in contempt cannot apply for the costs of an abandoned motion.—*Barker v. Dawson*.[§] Distinction where irregular order obtained prior, and where obtained subsequent to the contempt.—*Parry v. Perryman*.^{||} Case where the party in contempt is merely protecting himself.—*Needham v. Needham*.[¶] Motion, under the circumstances, dismissed with costs; the defendant being in contempt for non-payment of costs of a like motion.

PRINCIPAL AND SURETY.

See Miscellaneous Notes of some Cases and Dicta in the Reports upon the Law of Principal and Surety, 1 C. P. Coop. 563—674.

Cases on the
law of prin-
cipal and
surety.

* 1 Rep. temp. Cott. 205.

† *Ibid.* 206.

‡ *Ibid.* 207.

§ *Ibid.*

|| *Ibid.*

¶ *Ibid.* 208.

Our rules ought to assist justice and not to defeat it. If a defendant's statement of a fact is to be made the basis of a decree, the whole statement should be taken and not merely a part of it. A different course would resemble a garbling of the proofs.

V. C.
March, 1825.

Parties are not at liberty to withdraw any proof that the Court may desire to see.

Watkins v. Chuck.

Sir John Leach.—Evidence is designed to assist the court in its search after the truth. There is no deposition that the court may not look at. The parties are not at liberty to withdraw any proof that the court may desire to see. We, some of us, recollect the case before Lord Thurlow. A deposition showed that neither plaintiff nor defendant was entitled to a fund. It belonged to a third party. Both plaintiff and defendant were desirous that the deposition should not be read, but Lord Thurlow, chancing to learn that there was such a deposition, called for it, perused it, and then found the means of impounding the money until such time as the true owner could take proceedings for having it transferred to him.*

V. C.
Feb. 1818.

Course where one of several infant co-plaintiffs attaining 21, objects to the use of his name in the character of a co-plaintiff.

Newman v. Newman.

Sir John Leach.—One of several infant co-plaintiffs attaining his age of twenty-one, and objecting to the use of his name in the character of a co-plaintiff, the proper course is to make him a defendant instead of a co-plaintiff, by amendment in cases where it is not too late to make an amendment of that kind, and by supplemental bill where it is too late.

PURCHASE FOR VALUABLE CONSIDERATION—PRODUCTION OF DEED.

L. C.
Nov. 1837.

Purchase for valuable consideration. Production of deed.

Lord Cottenham.—Where there is an equitable ejectment bill and the answer sets up the defence of purchase for valuable consideration without notice, but the recitals of the deed, contained in the answer, plainly show notice, the plaintiff shall, upon motion, have the production and inspection of the deed,†

* See *Capell v. Hayman*, 1 Rep. temp. Cott. 336. Every witness is the witness of the Court, and either side may use his evidence.

† See *Neesom v. Clarkson*, 1 C. P. Coop. 93.

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III.

INFANTS CO-PLAINTIFFS WITH ADULTS.

Lord Cottenham.—The circumstance that infants are co-plaintiffs with adults does not preclude an inquiry whether the suit is for the benefit of the infants.*

L. C.
June, 1837.

Infants co-plaintiffs with adults.

York Buildings Company v. Mears.

Contracts to be judged according to the law of the place where such contracts are made.†—From Lord Harcourt's MS. Table.

House of
Lords.
May 23, 1728.

Contracts to be judged according to the law of the place where such contracts are made.

Tucker v. Watkins.

Sir Lancelot Shadwell.—In a suit in which A. and B. are plaintiffs, defendant is attached and in custody for want of an answer, and then B. dies, and the suit is so far abated. I am of opinion that the defendant may nevertheless file his answer, entitling it the answer to the bill of A. and of B., since deceased, and clear the contempt, and release himself from custody.

V. C.
May, 1838.

Defendant in custody for want of an answer, and suit abates.

Mould v. Smythe.

Sir J. Leach.—Defendant in custody for any contempt in a suit abating, whether before or after decree, may clear his contempt and get out of custody, without waiting until the suit is revived. Lord Redesdale has indeed said [Treatise, page 61 in the note, 3rd edit.] that, in general, revivor is necessary to warrant any proceedings after abatement; but then his lordship excepts proceedings to prevent injury to the surviving parties.

V. C.
Feb. 1820.

Defendant in custody for any contempt in a suit abating whether before or after decree.

Harrison v. Lardner.

Sir Thomas Plumer.—Proceedings for want of answer or examination are suspended by plaintiff's death. Neither answer nor examination can be taken whilst the suit is thus abated, unless the defendant is in custody for a contempt for not having put in the same. In such a case the Court will do what is requisite to enable the defendant to purge his contempt and be released from custody.

V. C.
June, 1817.

Whilst suit abated by plaintiff's death, neither answer nor examination can be taken, unless the defendant is in custody for a contempt for not having put in the same.

* See *Robinson v. Stone*, 1 C. P. Coop. 369.

† See *Lashley v. Hogg*, ante, 16, 17. See *Thompson v. Powles*, 2 Rep. temp. Cott. 4. The validity of a contract must be determined by the law of the country in which it is to be carried into execution. See further the Cases and Observations contained in a subsequent number of the present publication.

V. C.

Nov. 1820.

A co-plaintiff
dying, an at-
tachment is
nevertheless
issued.

Fenning v. Taylor.

Sir John Leach.—A. B. and C. D. are co-plaintiffs, and C. D. dying, an attachment is nevertheless issued, entitled at the suit of A. B. and of C. D. deceased. The regularity of such attachment depends upon the question whether the representatives of C. D. have an interest in the suit. If they have, may not the attachment be set aside?

V. C.

Nov. 1824.

An attach-
ment issued
during the
abatement of
suit by death
of one of the
plaintiffs.

Gibson v. Cheston.

Sir J. Leach.—Lord Redesdale says [Treatise, page 45, 3rd edition] that the interest of a plaintiff generally extends to the whole suit; therefore, in general, upon the death of a plaintiff all proceedings become abated. His lordship's proposition clearly extends to the case of one of several plaintiffs dying. I am therefore of opinion that an attachment, if issued during the abatement of a suit by the death of one of several plaintiffs, is issued improperly and irregularly, and ought to be set aside.*

V. C.

Nov. 1824.

Court, upon
motion to set
aside attach-
ment, will de-
termine whe-
ther there is
an abatement.

— — — V. — — —

Sir John Leach.—If the surviving plaintiffs mean to contend that the suit is not abated by the death of a co-plaintiff, then they may be justified in issuing an attachment; but the Court, upon a motion by the defendant to set aside the attachment for irregularity, will itself determine whether there is an abatement or not.

V. C.

Nov. 1824.

One of the
plaintiffs
dead, and suit
not revived
before the is-
suing of an at-
tachment, the
attachment is
irregular.

Gibson v. Cheston.

12th Nov. 1824.—John Gibson the elder, and Ann his wife, and others, plaintiffs; Thomas Cheston, defendant. Upon opening the matter this present day unto this Court by Mr. Pemberton, of counsel for the defendant, it was alleged that an attachment hath issued against the defendant for want of his answer to the plaintiffs' bill; that it appears by the affidavit of Charles Cheston and of the defendant, that he the said deponent, Charles Cheston, knew and was well acquainted with George Mills, one of the plaintiffs in this cause, and that the said George Mills died

* See *Gibbs v. Churton* [*Gibson v. Cheston*], 1 C. P. Coop. 496. It appears from the author's MS. that the attachment was for want of an answer.

in the month of February, 1824; and the said deponent, Thomas Cheston, saith that the attachment issued out against him in this cause was executed on the 17th of May last, since which time he the said deponent hath been in custody. That inasmuch as the said plaintiff, George Mills, died, and the suit was not revived before the issuing of the said attachment, the said defendant submits that the said attachment is irregular. It was therefore prayed that the said attachment, issued against the defendant for not answering the plaintiff's bill, may be discharged with costs for irregularity, which, upon hearing Mr. Bell of counsel for the plaintiffs, and the said affidavit read, is ordered accordingly; and it is further ordered, that it be referred to Mr. Cox, one of the Masters of this Court, to tax the said costs, if the parties differ about the same.—Reg. Lib. A. 1824, fol. 29.

RIGHT OF DISCOVERY OF EXISTENCE AND CONTENTS OF A DEED,
WHERE, NEVERTHELESS, UNTIL HEARING, NO RIGHT OF PRO-
DUCTION AND INSPECTION.

It is very common for a plaintiff to have a right to an immediate discovery of the existence and contents of a deed, where nevertheless, until the hearing of the cause, he has no right whatever to any production and inspection of it. For example, the heir or devisee bringing a bill against a purchaser from the ancestor or devisor, such purchaser alleging valuable consideration, the plea or answer must state the particulars of the purchase-deed, as the date of it, the names of the parties executing it, the consideration, &c.; but it is only upon the hearing of the suit, a replication having been filed to the plea or answer, that the heir or devisee has a right to handle and peruse the purchase-deed, and, of course, then only upon the supposition that his title, if there was no such deed, is admitted or proved.—Abridged from an Old MS. Treatise of Chancery Practice.

Right of discovery of the existence and contents of a deed, where nevertheless until hearing no right of production and inspection.

O'Keefe v. Hutchinson.

Sir J. Leach.—Plaintiff is heir, and defendant is purchaser from the ancestor. Plaintiff, there being admission or proof that he is heir, has a right at the hearing to look at the purchase-deed which has taken the estate from him, the plaintiff, and has vested it in the defendant.

V. C.
May, 1825.
Heir's right at hearing to look at the purchase-deed which has taken the estate from him.

HEIR AND THE DEED THAT HAS DISINHERITED HIM.

Heir and the deed that has disinherited him.

Heir has the same right to see the deed, that he has to see the will, that has disinherited him.—Old MS. Note in Book of Practice.

HEIR OR DEVISEE AND PURCHASER OR MORTGAGEE AND HIS DEEDS.

Heir or devisee and purchaser or mortgagee and his deeds.

The heir or devisee may, at the hearing of the suit, compel the purchaser or mortgagee to show his purchase or mortgage deed; but he cannot compel him to show his other deeds.—Old MS. Note in Book of Practice.

L. C.
Jan. 1750.

Tenant for life, representing that he was tenant in fee, sold the estate. Remainder-man brought a bill against purchaser. Notice was charged by the bill, but denied by the answer. A motion was made for production of the deeds.

Ashton v. Ashton.

Lord Hardwicke.—Here tenant for life, representing that he was tenant in fee, has sold the estate. The remainder-man has brought a bill against the purchaser. Notice is charged by the bill, but it is denied by the answer. In this state of things a motion is made for the production of the deeds; but it is quite impossible that it can be granted. The plaintiff must reply to the answer, and prove notice if he can. If he has witnesses who can prove notice, or if the purchase-deed when brought forward at the hearing shows notice, the plaintiff may be relieved: otherwise not.—Abridged from a contemporary MS.

L. C.
Dec. 1799.

The rule, that purchaser or mortgagee denying notice shall not be compelled to show his deeds, does not extend to his own purchase or mortgage-deed.

Puller v. Smythe.

Lord Loughborough.—Where plaintiff has been deprived of his estate by fraud, but defendant insists by plea or answer that he is entitled to it as purchaser or mortgagee for valuable consideration, without any notice of plaintiff's right, and plaintiff at the hearing fails to bring forward evidence affecting the defendant with notice, yet the defendant must then show his purchase or mortgage deed, for that may contain notice either express or constructive. The rule that a purchaser or mortgagee shall not be compelled to show his deeds does not extend to his own purchase or mortgage deed.—From a cotemporary Law MS.

Birkett v. Flight.

Sir Thomas Plumer.—Plaintiff, where defendant is purchaser or mortgagee without notice, shall not before the hearing see any deeds; neither shall he at the hearing see any deeds, except the purchase or mortgage deed.—Abridged from MS. Notes.

V. C.
Dec. 1815.
Plaintiff, where defendant is purchaser or mortgagee without notice, shall see no deeds except the purchase or mortgage deed.

Heaton v. Griffith.

Sir J. Leach.—No man's estate would be secure if the plaintiff's assertion by the bill, that a deed in defendant's possession will show the plaintiff's title, gave the plaintiff a right, without more, to the production and inspection of such deed.

V. C.
Dec. 1823.
Assertion by plaintiff that a deed in defendant's possession will show plaintiff's title.

Ximenes v. Bernales.

Lord Hardwicke.—The answer denying the allegation in the bill, that a deed in the defendant's hands contains a trust for the benefit of the plaintiff, and there being no evidence in support of such allegation, an inspection of the deed shall not be enforced by this Court.—Old MS. Note.

L. C.
1750.
Allegation in the bill that a deed in defendant's hands contains a trust for the benefit of plaintiff.

Lethbridge v. Taylor.

Sir L. Shadwell.—In general, deeds in which plaintiff and defendant are both interested, for example, as coparceners, joint-tenants, tenants in common, &c., must be produced.

V. C.
May, 1838.
Deeds in which plaintiff and defendant are both interested must be produced.

PRODUCTION OF DOCUMENTS BEFORE THE HEARING.

Lord Chancellor Cottenham, A.D. 1849.—There is no part of the Court's jurisdiction more frequently and more usefully exercised than that which compels the production of documents before the hearing, and yet there is, perhaps, no class of authorities more conflicting than that which concerns it. We often search in vain for the principle applicable to the particular case. It may be discovery; it may be security; it may be something else.—Notes of Conversations of Eminent Lawyers.

Production of documents before the hearing.

The Improvement of the Jurisdiction of Equity Act, 15 & 16 Vict. c. 86, contains the two ensuing provisions relative to the production of documents:—

Remarks.
Provisions in the Improvement of Jurisdiction of Equity Act

Sect. 18. It shall be lawful for the Court, upon the application of the

relative to the
production of
documents.

plaintiff in any suit in the said Court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Sect. 20. It shall be lawful for the Court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the Court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

V. C.

May, 1827.

If documents are in a party's power the Court will order him to produce them in a reasonable time, although they are at the antipodes.

Penton v. Robinson.

Sir Anthony Hart.—Discovery by production and inspection of documents is a most useful and important part of the jurisdiction. The circumstance that the documents are abroad must necessarily delay that discovery, but cannot altogether prevent it. For if documents are in a party's power, the Court will order him to produce them in a reasonable time, although they are at the antipodes. Were it otherwise, justice often might very easily be defeated.

V. C.

Jan. 1824.

For the purpose of discovery, production and inspection of documents, the possession of the party's solicitor, or other agent, is the possession of the party himself.

Kitson v. Wright.

Sir John Leach.—For the purpose of discovery, production and inspection of documents, the possession of the party's solicitor, or other agent, is the possession of the party himself. In such a case the Court will order the party to set out the contents of documents, to produce them, and to allow them to be inspected, notwithstanding they are not in his actual custody.

V. C.

May, 1825.

A party's agent refusing to pro-

Robins v. Hopkinson.

Sir John Leach.—A party's agent refusing to produce a document, which the Court has ordered the party to produce, he

must state that special circumstance as the reason why process should not issue for compelling his compliance with the Court's order, or why, if issued, it should be stayed.

duce a document, which the Court has ordered the party to produce.

Parker v. Towerson.

Sir John Leach.—The agent of a defendant refusing to produce a document which the Court has ordered the defendant to produce, it may be requisite to make such agent a co-defendant, and obtain an order against him. Many of us recollect cases of that kind.

V. C.
Feb. 1824.

Agent of a defendant refusing to produce a document, it may be requisite to make such agent a co-defendant.

Price v. Templeton.

Sir John Leach.—The Courts of Westminster Hall will not permit justice to be delayed, much less defeated, by an attorney of one of the parties who may happen to have got the custody or control of funds or documents which are the subjects of the litigation. An attorney is a judicial officer. There is a summary and immediate jurisdiction which will at once bring him back to the path of his duty, should he be so ill-advised as to turn aside from it.

V. C.
Nov. 1822.

The attorney of one of the parties having got the custody or control of funds or documents, the subject of the litigation.

Naylor v. Samson.

Sir Thomas Plumer.—Will the Court order the production of a document which is not the sole property of persons parties to the cause?

V. C.
May, 1817.

Question as to the production of a document not the sole property of persons parties to the cause.

Brooks v. Brooks.

Lord Cottenham.—The instrument in question belongs to two partners, one only of whom is before the court. There can be no production of a partnership instrument where both partners are not parties to the suit.

L. C.
March, 1826.

No production of partnership instrument, where both partners are not parties to the suit.

DEMURRERS AND PLEAS.

Mr. [afterwards Sir Anthony] Hart,* A. D. 1817.—Where demurrers and pleas are not accompanied by answers, the demur-

Demurrers and pleas.

* Vice-Chancellor of England, May, 1827; Lord Chancellor of Ireland, November, 1827.

ners and pleas commonly do not cover enough; and where demurrers and pleas are accompanied by answers, the answers commonly go to matters covered by the demurrers and pleas. * *

* * Demurrers and pleas might have been invented for the benefit of the suitors, but in my days they have been used rather for the benefit of the solicitors and the counsel.—Notes of Conversations of Eminent Lawyers.

Remarks. See now 36th and 37th General Orders of August, 1841.

**DEFENDANT NOT PROTECTING HIMSELF FROM ANSWER BY
DEMURRER.**

Defendant
not protect-
ing himself
from answer
by demurrer.

Lord Langdale, A. D. 1840.—The old rule that in general a defendant who, by demurrer, might have protected himself from answering an interrogatory, but who has neglected to do so, cannot, by answer, decline answering such interrogatory, is one of those technical rules which I have never known in any way ancillary to the attainment of justice.—Notes of Conversations of Eminent Lawyers.

Remarks. See now the 38th General Order of August, 1841.

Demurrers and Pleas.

Demurrers
and pleas.

A demurrer must suggest no fact not to be found in the bill. A plea must, in general, suggest some fact to be proved and which is not to be found in the bill. A demurrer must not "speak." A plea must "speak."—Old MS. Note.

V. C.
Feb. 1823.
Speaking de-
murrer.

Bond v. Baker.

Sir J. Leach.—A demurrer which introduces a fact not stated by the bill is a speaking demurrer and must be overruled.

V. C.
June, 1825.
Demurrer ad-
mits the facts,
but not the
law stated by
the bill.

Crosswell v. Crosswell.

Sir J. Leach.—A demurrer admits the facts but not the law stated by the bill. For instance, the bill sets forth a will and alleges devisee entitled absolutely. Demurrer will nevertheless hold if the words of the will show devisee not entitled absolutely.

Oxbridge v. Staveley.

Lord Hardwicke.—If a fact be such that without it a demurrer will lie, a statement that plaintiff has been so informed is an insufficient averment.—MS. Rep.*

L. C.
Dec. 1747.
Demurrer.
Insufficient
averment.

Smith v. Thompson.

Sir J. Leach.—Wherever a demurrer covers too much it is necessarily overruled.

V. C.
Jan. 1823.
Demurrer
covering too
much.

Booth v. Jackson.

Lord Loughborough.—Equity does not favour double pleas.

L. C.
Jan. 1800.
Double pleas.

Harrison v. Edwards.

Sir J. Leach.—Various but not inconsistent facts, which reduce the defence to one point, are properly joined in one plea.†

V. C.
June, 1825.
Facts properly
joined
in one plea.

Alder v. Baxter.

Sir J. Leach.—Where the bill alleges notice of the plaintiff's title, a plea of purchase for a valuable consideration contains averments denying such notice. It is also necessarily accompanied by an answer denying such notice. The denial by averments in the plea has been often held sufficient, whilst the denial by the answer has, upon exceptions, been held insufficient.

V. C.
July, 1825.
Plea of purchase where
bill alleges
notice.

Cobbold v. Cobbold.

Sir J. Leach.—Where the bill alleges fraud the bill must be accompanied by an answer. The circumstances charged as fraud must receive a double denial; first, by averments in the plea, and next, by the answer.

V. C.
Nov. 1822.
Plea where
bill alleges
fraud.

Waters v. Matthew.

Sir J. Leach.—Wherever a plea covers too much, it is clear it must be overruled.

V. C.
Nov. 1822.
Plea covering
too much.

* See *Wyngats v. Robins*, 2 Rep. temp. Cott. 217. Demurrer allowed to ejectment bill, which only stated that defendant pretended there was an outstanding term.

† See also *Tailor v. Simpson*, 1 C. P. Coop. 504. A plea may aver several circumstances and still not transgress the rule, which requires that it should reduce the defence to a single point: as where the several circumstances all tend to that single point: but still the single point must be there—it must be distinctly averred by the plea—the defence must be brought to that.

PLEA OF NO PARTNERSHIP.

Plea of no partnership overruled for a technical reason, when there was in fact no partnership. Mr. Hart, A. D. 1825.—There was a case in the last Chancery of Lord Thurlow in which the bill asserted that a partnership had subsisted between the plaintiff and the defendant (a very wealthy merchant in the city) during a quarter of a century, and called upon the defendant to set out all the accounts during that period by way of schedule to the answer. There was a plea of no partnership put in; but this negative plea was, for some technical reason, overruled. There was, in fact, no partnership: but in those days the practice was thought to require, the plea having failed, that the defendant should give the accounts, and he only avoided the disclosure of all his commercial dealings, for the space mentioned, by the payment to the plaintiff of a large sum of money.—Notes of Conversations of Eminent Lawyers.

V. O.
Feb. 1814.
Bill alleging partnership, and answer denying it, the accounts must nevertheless be set out.

Harris v. Evans.

Sir Thomas Plumer.—Bill alleging partnership and answer denying it, the accounts must nevertheless be set out.

RELEVANCY OR MATERIALITY OF STATEMENTS AND QUESTIONS.

Relevancy or materiality of statements and questions.

Mr. Hart, A. D. 1823.—Until it is clear that in deciding on the sufficiency of an answer you can take into consideration the relevancy or materiality of statements and questions, the jurisdiction of the court to enforce discovery will continue to be an engine of very great oppression.—Notes of Conversations of Eminent Lawyers.

Remarks.

See the 74th General Order of April, 1823.

AMENDMENT BY STATING FACTS OCCURRED SINCE FILING BILL.

Exception to the rule that a bill may not be amended by stating facts that have occurred since the filing of the original bill.

There is an exception to the rule that a bill may not be amended by stating facts that have occurred since the filing of the original bill. The exception is where the answer sets out facts of that description by way of defence. It would be most unfair to allow an objection to an amended bill because it contains facts that have happened during the litigation, when the answer itself has brought forward those very facts.—From a MS.

Note written in a copy of Lord Redesdale's Treatise about the year 1785.

The Improvement of the Jurisdiction of Equity Act, 15 & 16 Vict. c. 86, has the following provision respecting facts or circumstances which have occurred after the institution of a suit.—Section 53. It shall not be necessary to exhibit any supplemental bill in the said court for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same, as shall in that behalf be prescribed by any General Order of the Lord Chancellor.

Remarks.
Provision in the Improvement of Jurisdiction of Equity Act respecting facts or circumstances which have occurred since the institution of the suit.

Wright v. Matthen.

Sir Thomas Plumer.—Where the defendant states by the answer, events that have occurred subsequent to the filing of the bill, the plaintiff may, in general, state such events in the bill by amendment, and may interrogate the defendant thereto.

See the preceding article.

V. C.
Dec. 1816.
Defendant stating in the answer events that have occurred subsequent to the filing of the bill, plaintiff may state such events in the bill by amendment.

Horner v. Fortescue.

Lord Hardwicke.—A supplemental bill is not confined to matters which have happened since the filing of the original bill. If the pleadings be no longer in a state that, according to the course of the Court, the original bill can be amended, and facts existing when the original bill was filed are then for the first time discovered, the same may be brought forward by a supplemental bill.

L. C.
1744.
Supplemental bill is not confined to matters happening since filing of original bill.

Goodwyn v. Goodwyn.

Lord Hardwicke.—What is proper for amendment is also proper for supplement—the state of the pleadings no longer admitting of amendment, and there having been no neglect, so that the new matter could not by reasonable diligence have been known before.

L. C.
1747.
Where what is proper for amendment is also proper for supplement.

V. C.
Feb. 1817.
Error in original bill may in some cases be corrected by supplemental bill.

Hutchinson v. Humfrey.

Sir Thomas Plumer.—When it is too late to amend the original bill, an error in it may, in some cases, be corrected by a supplemental bill.

L. C.
1755.
Supplemental bill to bring forward matters in existence when original bill filed, but not discovered until such time as there can be no amendment, needs no leave of the Court.

Garner v. Ford.

Lord Hardwicke.—A supplemental bill to bring forward matters in existence when the original bill filed, but not discovered until such time as by the practice there can be no amendment (as after witnesses examined), needs no leave of the Court.

L. C.
July, 1838.
Question as to application to Court for leave to file a supplemental bill, to bring forward matters discovered so late that they could not be introduced into the original bill by amendment.

Attorney General v. Fishmongers' Company.

Lord Cottenham.—Are there in the books any cases in which, prior to the hearing, application has been made to the Court for leave to file a supplemental bill, in order to bring forward matters discovered so late that they could not, according to the practice, be introduced into the original bill by amendment?

Swann v. Swann.

Eq. Exch.
Nov. 1820.
Where circumstances so imperfectly stated by bill that the particular relief to which plaintiff is entitled cannot be given, there is power in the Court to order that the cause shall stand over, and to give leave to file a supplemental bill.

Chief Baron Richards.—Where circumstances are so imperfectly stated by the bill, that the particular relief to which the plaintiff appears entitled cannot be given, there is certainly power in the Court to order that the cause should stand over, and to give leave to file a supplemental bill for the purpose of bringing forward the other necessary circumstances. But this is a power which must be exercised with great caution, and it has very rarely been exercised of late years.

SUBPŒNA TO HEAR JUDGMENT.

Affidavit of testator, defendant to an original bill, having been

Executor, defendant to bill of revivor, producing affidavit of his testator, defendant to original bill, having been served with subpoena to hear judgment; it has been held, that this was not

sufficient to entitle him, plaintiff making default at the hearing, to have the bill dismissed with costs.—Old MS. Note in a Book of Practice.*

served with subpoena to hear judgment.

SUBPŒNA TO HEAR JUDGMENT.

Plaintiff producing affidavit of his having served testator, defendant to an original bill, with subpœna to hear judgment; it has been held, that this was not sufficient to entitle the plaintiff—executor, defendant to bill of revivor, making default at hearing—to take such decree as he could abide by.†—Old MS. Note in a Book of Practice.

Affidavit of plaintiff having served testator, defendant to an original bill, with subpoena to hear judgment.

SUBPŒNA TO HEAR JUDGMENT.

There is an omission in the marginal note to the case of *Hern v. Robson*, ante, 9, which may mislead the student. Instead of "A suit, by reason of abatement or other defect, goes out of the paper—the subpœna to hear judgment still efficacious," read "A suit, by reason of abatement or other defect, goes out of the paper—the subpœna to hear judgment *being* still efficacious." The words of the text are correct.—"A suit, by reason of an abatement or other defect, goes out of the paper, but the subpœna to hear judgment is still efficacious." In the case of abatement, where the subpœna to hear judgment having been served, plaintiff dies, and his representative revives, the writ (to use Sir J. Leach's expression) is still efficacious as regards all the defendants. So where the subpœna to hear judgment having been served, one of several defendants dies, and the suit is revived against his representative, the writ is still efficacious as regards all the other defendants. In the case of defect—for instance of parties and consequent liberty to amend—the subpœna to hear judgment having been served, the new defendants having been brought before the Court, the writ is still efficacious as regards all the old defendants.

Case of *Hern v. Robson*, ante, 9.

REVIVOR AND SUPPLEMENT.

In the first sheet or number of this volume, there are three cases [*Dane v. Worthall*, *Humphreys v. Wallis* and *Re Smythe*],‡

Revivor and supplement. Three cases in first No. of this vol.

* See *Colebrooke v. Randle*, ante, 9.

† See the case cited in the preceding note.

‡ All three are in p. 10.

which would have been omitted had it been put into type subsequently to the Report of the Chancery Commissioners, and the introduction into the House of Lords of the Improvement of the Jurisdiction of Equity Bill.—(See the Preface.)

A liberty
which the au-
thor will take.

It will be seen however from the contents of the present number, that the author will take the liberty occasionally to introduce cases, dicta, and notes of various kinds which afford opportunities of noticing important and beneficial ameliorations of procedure.

L. C.
1748.

The Stamp
Act a reason
why the
Court should
endeavour to
multiply ex-
ceptions to
the old rule
that there
shall be no
revivor for
costs.

REVIVOR FOR COSTS.

Lord Hardwicke.—Early in the reign of William and Mary the necessities of the public service occasioned the passing of a Stamp Act.* That measure has greatly increased the amount of costs, so that now they often bear no inconsiderable proportion to the value of the litigated property. The Stamp Act is a reason why the Court should endeavour to multiply exceptions to the old rule that there shall be no revivor for costs.—From a law MS. of the time.

Creditor's
decree—
Statute of
Limitations.

CREDITOR'S DECREE—STATUTE OF LIMITATIONS.

Creditor's decree has relation back to the filing of the bill, and the Statute of Limitations does not bar the debt of any creditor coming in under the decree that was not barred at the time when the bill was filed.—MS. Note in an old Book of Practice.†

Legatee's
decree—
Statute of
Limitations.

LEGATEE'S DECREE.—STATUTE OF LIMITATIONS.

Legatee's decree has no such virtue as a creditor's decree. It has no relation back to the filing of the bill so as to remove the bar that the Statute of Limitations may have raised, between that period and the period of the decree, against the recovery of any debt.—MS. Note in an old Book of Practice.‡

V. C.
July, 1828.

Answer of
feme covert
touching her
separate es-
tate may be
read against
her.

Barker v. Barker.

Sir L. Shadwell.—A feme covert as regards her separate estate must, in general, be regarded as a feme sole. When,

* 5 & 6 Will. & M. c. 21.

† See *Quelman v. Long*, ante, 16.

‡ See *Bird v. Currie*, ante, 16.

therefore, she answers without her husband, her answer touching her separate property may be read against her, just in the same way as if she was not married.*

Carter v. Anderson.

A feme coverte entitled, to her separate use, to an annuity charged upon a plantation in the West Indies, filed a bill for the payment of the arrears. The answer stated that her husband was, during the period that the arrears had accrued, the consignee of the estate, and that the balance due from him exceeded the amount of the arrears. Sir John Leach.—Her husband's hand was the hand to pay her. He has retained more than sufficient to satisfy all the arrears. The owner of the estate might reasonably suppose that the annuity was regularly paid, or that the wife authorized the husband to retain it. She knew her husband received the annual proceeds, and as she did not think fit to call upon him at the time, it would be inequitable now to allow her to come upon the plantation. No one ought to suffer by her laches except herself.

V. C.
March, 1823.
Wife claims arrears of an annuity, out of plantation, of which husband was the consignee.

WIFE'S EQUITY.

Sir Lancelot Shadwell.—It is contended, the wife insisting upon her equity to a settlement, and the Court thinking her, under the circumstances, entitled to a moiety of the fund, that such moiety must bear all her costs of the suit. I do not think that this would be right. Let her costs be paid out of the entire fund, and then let a moiety of what shall remain be settled upon her.†

V. C.
Nov. 1837.
Wife insisting upon her equity to a settlement, and the Court thinking her entitled to a moiety of the fund, it was contended that such moiety should bear all her costs of the suit.

Winchester v. Ellice.

Lord Loughborough.—Where the husband, upon application of the wife's relations and friends, refuses to settle upon her an adequate part of the property to which he is entitled in her right, the Court will restrain him from getting possession of the property, and will impound it until a fit provision has been made by him. Her equity to have a proper settlement must be enforced. A writ of injunction ought to issue as ancillary to that purpose where, without such aid, there is danger of its being defeated.—Author's MSS.‡

L. C.
July, 1793.
Wife's equity to a settlement—
Injunction against the husband.

* See *Bailey v. Jackson*, 1 C. P. Coop. 495.

† See *Archer v. Gardner*, 1 C. P. Coop. 340.

‡ See *Ellis v. Ellis*, 2 Rep. temp. Cott. 234.

WHAT INCOME THE TENANT FOR LIFE OF RESIDUE IS ENTITLED TO, AND WHEN THE SAME IS TO BEGIN.

Cases upon the question, what income the tenant for life of residue is entitled to, and when the same is to begin.

See cases upon the question what income the tenant for life of residue is entitled to, and when the same is to begin, 1 Rep. temp. Cott. 152—194. The marginal notes are as follows:—What is not upon proper security must be sold and invested in £3 per cents., and the dividends paid to the tenant for life.—Where there was a direction to invest on government or real securities.—Case of an executor directed to lay out upon good freehold security, and not able to find any, retaining the money in his hands.—Where there was no direction to invest on government or real securities.—The rule of sale and investment in £3 per cents., and payment of the dividends to the tenant for life, held not to apply whilst the parties were in the East Indies.—Cases in which it is uncertain whether there was a direction to invest on government or real securities.—Where there was a direction to invest in land.—Where, until the permanent investment, an accumulation of the income was directed.—Where no accumulation of the income directed. Sir John Leach and Sir Thomas Plumer held that the income of the residue for the first year must be added to the capital.—Tenant for life entitled to income from death, where the conversion and investment unconnected with the general administration of the testator's estate.—Tenant for life entitled, from the death of the testator, to income of property not wanted for the payment of debts and legacies.—Tenant for life entitled, from the death of the testator, to the income of funds, which, at the time of the death, were invested on proper securities.—Where the investment takes place during the first year, the tenant for life is entitled to the income from the period of investment.—Question as to the title of tenant for life to interest from the death of the testator, in respect of property, which was not, at the time of the death, invested upon proper security.—Although the property produce no income, yet the tenant for life is not to be deprived of interest.—Cases in which the property could not be converted; or the parties acquiesced in its not being converted, or from an innocent mistake it had not been converted.

L. C.
Dec. 1849.
Agreement—
Plan—In-
junction.

AGREEMENT—PLAN—INJUNCTION.

Lord Cottenham.—Where there is an agreement and a plan, and one party to the agreement calls upon the Court to interpose,

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by injunction, to prevent the other party from doing an act incompatible with the plan, it must be shown, not merely that the plan was exhibited when the agreement was entered into, but that it forms part of the agreement.*

IV.

Decisions and Dicta of Sir EDWARD SUGDEN, when Lord Chancellor of Ireland.—
Nov. 1834—April 1835, and Sept. 1841—July 1846.

ACCOUNT.†

ACCOUNT.

AN account of rent decreed under the circumstances. *Grant v. Rent. Bury, Llo. & Goo. 81.*

It was said that as to annual rests the ordinary rule is, that the Court will not direct, as against a mortgagee, the accounts so to be taken, if any arrear of interest be due when the mortgagee went into possession. The Lord Chancellor thereupon observed, that the case before him was a peculiar one, and could not be treated as the ordinary case between mortgagee and mortgagor. A title had been set up adverse to the owner, and when a creditor denied his character as such, and claimed as owner, he (the Lord Chancellor) could not allow him to fall back on his original character of creditor, as if he had never departed from it. He would never allow a party who had put the owner at arms' length, to turn round, when defeated, and claim all the benefits attached to the character of a fair creditor. Annual

Annual rests, where creditor denied his character as such, and claimed as owner.

* See *Breynton v. London and North Western Railway Company*, 2 Rep. temp. Cott. 108; *Horsfall v. Hodges*, *ibid.* 115; and *Schreiber v. Pitt*, *ibid.* 119. Consider also *Squire v. Campbell* (the case of The Equestrian Statue of King George 3, Pall Mall East), as stated 2 Rep. temp. Cott. 112—115.

† It is necessary to state, with reference to the decisions and dicta of Sir Edward Sugden, arranged under this and other principal heads of equity (see subsequent numbers of the present publication), that the editor has used the report of the case that happened to be within his reach at the time. He has, however, occasionally found that such report was by no means the fullest or the best. The practitioner and student will do well in every instance not to confine his research to one report. His trouble will not be thrown away. Sometimes he will find a dictum more neatly expressed and sometimes one entirely new.

ACCOUNT. rests were decreed. *Incorporated Society v. Richards*, 1 Dru. & War. 334.*

Bygone rents. Lord Chancellor.—An account of rents received prior to the filing of a bill for the administration of the real and personal estate of a deceased party is never directed at the original hearing. *Schomberg v. Humfrey*, 1 Dru. & War. 411.

It is the invariable rule of the Court, not to require the payment of rents which have been received, unless there exists a necessity for so doing; and from thence, sprung another equally fixed practice, that of not directing an account of rents received until, on the cause coming back, a necessity for such account is apparent.—S. C.

It is highly improper to allow parties to lie by, and then after a lapse, perhaps of several years, to come forward and seek an account of the rents, which have been in the meantime received and appropriated under an impression that it was not the creditor's intention to follow them.—S. C.

In the case of specialties, it is plain, that the rents and profits are liable to them, and it is to be feared, that however anxious the Court may be to afford parties protection against this lying by, the Court would, unless some authority were produced, be obliged to allow the ordinary account to go, from the great difficulty of fixing a period.—S. C.

See a subsequent page "Mortgagor and Mortgagee."

Decree to surcharge and falsify. Lord Chancellor.—In ordinary cases the rule seems to be, that the establishment of one mistake is sufficient to induce the Court to give a decree, entitling the party to surcharge and falsify an account.—*Lanless v. Mansfield*, 1 Dru. & War. 557. S. C. 4 Ir. Eq. Rep. 113.

Question, whether, in ordinary cases, where there are several distinct accounts and errors are alleged, and proved only in some of them, all are liable to be surcharged and falsified.—S. C.

No settled account proved. Where no settled account has been proved, but the answer suggests the existence of such an account, there, whether errors have been specified or not, the invariable practice has been to send the account to the master, with liberty for the plaintiff to surcharge and falsify if the master should find any settled account.—S. C.†

* See *Scholefield v. Ingham*, 1 C. P. Coop. 477. Question of annual rests on bill to redeem against mortgagees in possession.

† See also what the Lord Chancellor said in *Fitzpatrick v. Mahony*, 1 Jo. & Lat. 84, in which the defendants setting up a settled account, but not proving

Where the defendant proves a settled account set up by the answer, and no error is shown in the account by the plaintiff, the bill will be dismissed.—S. C.

ACCOUNT.

Settled account proved.

Where the relation of attorney and client subsists, in questions of accounts between the parties, the common rule does not prevail; though the plaintiff only alleges generally that the accounts are erroneous, the Court will make a decree, opening the accounts if sufficient cause be shown. This proposition is perfectly clear in law.—S. C.

Attorney and client.

Judgment creditor of debtor can insist that elegit creditor in possession shall be charged with all sums which, without wilful default, he might have received, only from the time of the judgment creditor filing his bill. *McDonnell v. Walshe*, 2 Dru. & War. 252. S. C. 1 Con. & Law. 388.

Elegit creditor in possession. Wilful default.

Debtor may insist that elegit creditor in possession shall be charged with all sums of money which, without wilful default, he might have received during all the time of such possession. *O'Brien v. Mahon*, 2 Dru. & War. 306.

In the first case, the counsel for the defendant, the elegit creditor, observed, that the plaintiff, the judgment creditor, had not issued an elegit; he had not taken any step to attach his judgment, and make it a lien on the estate of his debtor; he had not even given any notice to the defendant, the elegit creditor. In the second case, the Lord Chancellor pointed out the difference between the two cases. In the latter case, it was the debtor who was seeking the account for wilful default against the creditor; whereas, in the former case, it was a creditor of the debtor, not in privity with the estate, on whose behalf this account was asked for.*

See also a subsequent page "Mortgagor and Mortgagee."

Purchase being set aside in a suit which had been revived, after having been allowed to lie dormant for years, the account of rents was directed from the filing of the bill of revivor. *Thornhill v. Glover*, 3 Dru. & War. 195.

Purchase set aside.

it, and the decree taking no notice of this account, the master nevertheless acted upon it in his report. See also the note 1 Rep. temp. Cott. 487.

A settled account not put in issue is only evidence to ground a direction for inquiry, *ibid.* 486.

* See *Townshend v. Agnew*, 2 Rep. temp. Cott. 214. Creditor asking the aid of the court to enforce a judgment, not suing out elegit until after bill filed.

Account.

Lease of
charity pro-
perty set
aside.

Lease by corporation to one of their own body of property, which turned out to be dedicated to charitable purposes, being set aside, the Lord Chancellor said, that it was a matter of course to charge the lessee with the rents and profits from the period of the commencement of the lease. It was true, that the Court was always unwilling to direct an account for any great length of time, but that was only in cases where the funds have been supposed to belong to the person holding them, or where, although the parties have acted erroneously, still their conduct has not been corrupt. *Attorney-General v. Corporation of Cashel*, 3 Dru. & War. 294. S. C. 2 Con. & Law, 1.*

Lease set
aside. Delay.

Lease being set aside upon the ground of public policy, an account was given from the time of filing the bill, but not before by reason of the delay.—*Mulhallen v. Marum*, 3 Dru. & War. 317.

Twenty inde-
pendent set-
tled accounts,
and error
shown in the
last.

The Lord Chancellor said—What you are going to contend for is, that, if there be twenty independent settled accounts, and you show an error in the last, you may open them all. I looked very carefully into the point on a recent occasion, and I could find no authority to show that opening the last account necessarily, as you must contend, opens the former, unless they are connected together.—*Lucan v. O'Malley*, 2 Con. & Law. 180.

Bill to open
settled ac-
counts.

Bill filed by the representatives of Lord Lucan for the opening of certain accounts signed by him as settled accounts. The Lord Chancellor said, that the plaintiff should have taken the trouble to have gone into the accounts and specified particular errors. This was the law of the court, in order to give the defendant information, and to put an issue before the court. Lord Lucan settled the account, and the plaintiffs, as his representatives, sought to set it aside. This they could not do unless they showed specific errors; and instead of doing this, they lamented that the accounts were kept in such a way that they could not be specific in their charges; but the consequence of this was, that the accounts remained untouched.—S. C.

* See *Attorney-General v. Ladyman*, 1 C. P. Coop. 189. Purchaser of long building lease of charity land ordered to deliver up the same, and account for full rent from the filing of the information. In the next page of the same volume is a list of the principal cases upon the setting aside of long leases of charity property.

See *Attorney-General v. Newbury Corporation*, 1 C. P. Coop. 78. In general the period from which trustees ought to account for charity property, is the commencement of the breach of trust. Ignorance of the trustees that they were committing a breach of trust, ground for restricting the account.

See in a subsequent page of the present publication an extract from the judgment of Sir J. Leach in *Attorney General v. Joliffe*, 2 Rep. temp. Cott. 229.

The charges in the bill which has for its object to set aside several settled accounts, put in issue no error [in any particular account. The court is entitled to have specific errors laid before it in the bill. S. C.* Account.

An error of thirteen shillings in a large settled account was shown. The Lord Chancellor said he was not going to open the account for thirteen shillings. He would not open a large account for so small a sum. S. C. Settled account. Error of 13s.

The Lord Chancellor said, if he saw fraud in an account he would open it for three pence. S. C. Fraud.

An item of 240*l.* having been disproved in a settled account between an agent and his principal, it was submitted that the inquiry should be confined to that particular item. The Lord Chancellor said it was quite clear that if the plaintiffs showed one error in an account, they had a right to surcharge and falsify the whole of that account; if they showed one piece of fraud they could set the account aside altogether. He would not allow an account from an agent to a principal to stand in which an item which was not paid was taken credit for.—S. C. Item of 240*l.* disproved in a settled account.

The Lord Chancellor said, in this case a stated account has been set up. It is quite settled that, in ordinary cases, the form of pleading founded on justice and convenience must be adhered to. You must charge specific errors in your pleading and prove some of them. Then you are entitled to surcharge and falsify the entire account and show any other errors in the Master's office.—*Holland v. Holland*, 6 Ir. Eq. Rep. 407. Stated account. Specific errors.

The Lord Chancellor said he must allow the account to be corrected on two principles; first, although the relation existing between the two parties was not strictly that of solicitor and client, yet the accounting party filled the relation of both administrator and solicitor to the estate, and was, therefore, bound to account accurately; secondly, from the circumstance that the mistake to be corrected appeared on the face of the account and required no evidence extrinsic to explain it.—S. C. Two principles upon which an account allowed to be corrected.

The Lord Chancellor said, that the rule of the court respecting the opening of an account required errors to be charged in the bill as well as proved at the hearing, and it was founded on justice—to prevent a defendant being brought there in the dark and taken by surprise—to allow him an opportunity of explain- No one could look at the account, and not see that the sum to be corrected was improperly charged.

* See *Davis v. Starling*, 1 Rep. temp. Cott. 551. If a plaintiff, seeking by his bill to open a settled account, goes into evidence of errors not specifically set forth by the bill, the court will not allow such evidence to be read.

Account. ing them by statement and evidence. But in the case before him no evidence at all was wanted; no one could look at the account and not see that the sum to be corrected was improperly charged.—S. C.*

**Agent.
Interest.**

Question in taking accounts between an agent and his principal as to interest being charged on the balance in the agent's hands.—*Batemans v. M'Elligott*, 7 Ir. Eq. Rep. 471.

See a subsequent page "Agent."

**Evidence to
show the state
of the ac-
count.**

In suit by debtor against judgment creditor in possession it was objected, that evidence given by the plaintiff as to the rents received by the defendants ought not to be read. The Lord Chancellor said, the question really was, had the plaintiff gone into evidence to show the state of the accounts? If so, he had gone to an expense which was not necessary. He, the Lord Chancellor, did not, however, see any objection to entering the evidence as read. He did not see how it could be rejected, though he might make the party pay the costs occasioned thereby.—*Hamilton v. M'Cormick*, 3 Jo. & Lat. 183.†

**Partnership
books with-
held.**

Decree for partnership accounts, and the defendant declining to produce the partnership books, the Master charged a sum of 10 per cent. per annum on the capital stock as the net gains made by the partners during the continuance of the partnership. The Lord Chancellor said, he thought the Master had acted quite correctly. The defendant was endeavouring to baffle the justice of the court and to withhold the partnership books and documents. The Master was, therefore, compelled, in the absence of the evidence which the defendant withheld, to come to a conclusion on the matters referred to him. He had come to a very moderate conclusion. If he had charged the defendant with 20l. per cent. as the net profits, he, the Lord Chancellor, would have confirmed the report.—*Walmsley v. Walmsley*, 3 Jo. & Lat. 556.

**Attorney and
client.**

Decree giving client leave to surcharge and falsify his attorney's account.—*Jones v. Moffett*, 3 Jo. & Lat. 636.

[To be continued.]

* * The heads "Agent" and "Agreement" are in type, and will form part of the numbers immediately succeeding the present number.

* In *Taylor v. Simpson*, 1 C. P. Coop. 504, a plea of settled account was overruled, the various circumstances averred as amounting to a settlement of accounts not reducing the defence to a single point.

† See *Smythe v. Mac Taggart*, 1 C. P. Coop. 504. Attempt by evidence to prevent decree for account.

Creed v. Creed.

Extracts from Sir Edward Sugden's Treatise of the Law of Property as administered by the House of Lords (pp. 428 and 436).—In this case of *Creed v. Creed*,* the question was whether annuities, given by the will out of the real estate, had priority over legacies directed to be paid out of the personal estate; but also directed, as well as the debts, to be raised out of the real estate in case of a deficiency of the personal estate.—The annuitants were held to take in priority to the legatees, and in the result to wholly exclude them from the benefit of the real estate. This does not appear to have been the intention of the testator, and the annuitants would, it should seem, have had a full measure of justice by being allowed to stand on an equality with the legatees; nor was a contrary construction required by any rule of law of which I am aware.

House of Lords, April and Sept. 1844.
Question, whether annuities given by a will out of the real estate had priority over legacies directed to be paid out of the personal estate, but also directed, as well as the debts, to be raised out of the real estate, in case of a deficiency of the personal estate.

Some peculiar circumstances connected with this case (they may not be disclosed at present) make the author (he was one of the counsel engaged) desirous of giving increased publicity to the opinion expressed in the concluding lines of the foregoing extracts, by the insertion of them in this little volume.

Remarks.

Holdern v. Weld.

The bill stated, amongst other things, that the defendant had for some time past resided in France or elsewhere out of the King's dominions, and that he professed the Roman Catholic religion, and that he had become, or had taken some steps towards becoming, a member of some religious, or monastic, house or order. To this statement the defendant demurred, upon the ground that he ought not to be compelled to discover any matter, which might subject him to any penalties, disabilities, or forfeitures. On the plaintiff's behalf it was contended that the demurrer covered too much, inasmuch as assuming that the defendant might incur some penalty, disability or forfeiture, by going abroad in order to become a member of such establishment as aforesaid, yet he could not do so by merely residing in France or elsewhere out of the King's dominions, or by professing the Roman Catholic religion.

V. C. May, 1823.
Bill stated that the defendant had for some time past resided in France, or elsewhere out of the King's dominions, and that he professed the Roman Catholic religion, and that he had become, or had taken some steps towards becoming, a member of some religious or monastic house or order.

Sir John Leach.—The rule is that a defendant cannot be called upon to disclose not merely the broad, leading facts, but

* 1 Dru. & War. 416; 11 Cl. & Fin. 491.

the minor facts connected with them. We are not to consider whether his answer to any particular fact *must* subject him, but whether *it may* subject him, to penalty. The answer, perhaps, would contain nothing to affect him: but he has a right to object to it if such that it can anyhow be made to form a link in the plaintiff's chain of proof. The rule is one respecting which abstractedly there is no dispute. The difficulty is in the application of it to individual cases. It is frequently by no means easy to decide what questions may, and what may not, be considered as tending to render a defendant liable to pains. Sometimes the line of distinction is sufficiently marked and clear; but often it is ill-defined and hardly perceptible. In the present case, however, I am not sure that the questions, whether the defendant resides on the continent, and whether he is a Roman Catholic, could be brought within the rule, were it necessary to decide the point. If they were questions, the answers to which would, independently of the answers to the other questions, be of any service to the plaintiff, I doubt whether the defendant could object to them as being steps towards penalties and forfeiture, although requisite preliminaries to an entry into a foreign monastic establishment. But these questions are obviously altogether unimportant, except in connection with the other questions to which they lead—they are mere inducement—when taken by themselves they are useless. When questions can only serve to render other questions intelligible, then if there is protection against the principal questions, those which are merely subordinate may be neglected. Now here the substantial allegation respecting which discovery is sought, is that the defendant has become a member of some religious, or monastic, house, or order; to this the remaining allegations are only ancillary. Upon this ground I am of opinion that the demurrer is correct.

L. C.
1700.

Amendment
of prayer
after publica-
tion passed.

Beaumont v. Bolton.

Lord Loughborough.—There may be special circumstances which will induce the court to allow the plaintiff to amend his prayer after publication passed, but the facts alleged by the bill must warrant the proposed amendment, and there must be no surprise upon the defendant.—Editor's MSS.

Hawkins v. Miles.

Sir John Leach.—The usual order made at the hearing of a cause, that it shall stand over with liberty to amend by adding parties, authorizes beyond dispute, necessarily authorizes, the introduction of such matters into the bill as may be requisite to show the interest such new parties take in the subject of the suit. I am further of opinion, were it necessary to decide the point, that, should the plaintiff afterwards be advised that there are matters demonstrating that all persons interested are before the Court, this order would authorize an amendment alleging such matters; for instance, it would authorize an amendment alleging the non-existence of the persons whose absence was supposed to render the suit imperfect. But any amendment altering in any degree, however slight, the case or issue between the plaintiff and the old defendants, would be irregular.*

V. C.
Jan. 1823.
The order that
cause may
stand over,
with liberty
to amend by
adding par-
ties.

In *Millman v. Minshull*,† Sir Charles Pepys, after stating that where Remarks.
a suit upon the hearing appears to be so defectively constituted with respect to parties that complete justice cannot be done, the Court has from a very early time been in the habit, instead of dismissing the bill, of ordering that the cause should stand over with liberty to amend the bill by adding parties and then brought on again, added—that it seemed to follow from that practice, if the defect in the constitution of the suit was such, that it was probable that it might be supplied in any other mode, not productive of greater delay and expense to the defendant, that there

* Three years before, in *Ewens v. Jones*, 1 Rep. temp. Cott. 35, Sir John Leach, after observing that there are instances in which the Court has at the hearing authorized more extensive amendments than the mere addition of parties and the words necessary to charge them, added, that in such cases the further amendment is or ought to be specifically pointed out by the order; and the further amendment has not been of a nature to impose upon the defendant the necessity of making a new defence.

Extent of
amendments
to be made
under an or-
der intended
to enable a
plaintiff to
remove an
objection
taken at the
hearing for
defect of
parties.

See also the language of Sir William Grant in *Palk v. Clinton*, as stated 1 Rep. temp. Cott. 37, and the usual form of order to amend where, upon objection at the hearing, the cause stands over to add parties, *ibid.* 36.

The student will find the Observations 1 Rep. temp. Cott. 423—427—(Question upon the old practice respecting the amendment of bills where a suit was at the hearing found defective, because a matter had not been put in issue with sufficient precision)—not irrelevant to the question of the extent of the amendment to be made under an order intended to enable a plaintiff to remove an objection taken at the hearing for defect of parties.

All the recent decisions of the highest branch of the Court (1849) are consistent with those Observations.

† 1 Rep. temp. Cott. 35.

could be no objection in principle to allowing the plaintiff to have recourse to that mode.

See also the cases cited in the note to the case of *Millman v. Minshull*.

V. G.
Dec. 1826.
Order at the hearing, that the cause should stand over, with liberty to amend the bill, by striking out the infant heir as a co-plaintiff, and making him a defendant.

Adams v. Moody.

Sir John Leach.—The suit is to establish the will against the infant heir, and yet he is made a plaintiff. The suit is erroneously constituted. The hearing cannot usefully proceed until he is made a defendant. The better way will be to order that the cause stand over, with liberty to amend the bill, by striking out the infant heir as a co-plaintiff, and making him a defendant.

THE DIFFERENT SPECIES OF BILLS OF REVIVOR AND SUPPLEMENT.

The different species of bills of Revivor and Supplement.

Might not provision for the changes in litigating parties, which time inevitably produces, be made by some mode of proceeding less cumbrous and expensive than the different species of Bills of Revivor and Supplement, which are the subject of the most abstruse and unintelligible part of this book?—MS. note in the first edition of the late Lord Redesdale's *Treatise of Chancery Pleadings* [1780].*

Remarks.

Provision in the Improvement of Jurisdiction of Equity Act, 15 & 16 Vict. c. 86, s. 52, that it shall not be necessary to exhibit a bill of revivor or supplemental bill.

Such a provision as is suggested in the foregoing note, has been made by the recent Improvement of Jurisdiction of Equity Act, 15 & 16 Vict. c. 86—sect. 52. Upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill, in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive, or of the usual supplemental decree, may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served upon the party or parties who, according to the present practice of the said Court, would be defendant or defendants to the bill of revivor or supplemental bill, shall, from the time of such

* Lord Eldon said of this book, 9 Ves. 54, that it is a wonderful effort to collect what is to be deduced from authorities speaking so little what is clear, that the surprise is not from the difficulty of understanding all he has said, but that so much can be understood.

service, be binding on such party or parties, in the same manner in every respect as if such order had been regularly obtained, according to the existing practice of the said Court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the Clerks of Records and Writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill, filed against him [or them]; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any General Order of the Lord Chancellor, to apply to the Court by motion or petition to discharge such order, on any ground which would have been open to him [or them] on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party, until a guardian or guardians ad litem shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any General Order of the Lord Chancellor in that behalf.

Johnson v. Horlock.

Thursday, 11th November, 1708.—Eliza Johnson, plaintiff, John Horlock, defendant.—Upon motion this day made unto this Court by Mr. Moxon, being of the defendant's counsel, it was alleged that the said plaintiff, Elizabeth Johnson, formerly exhibited her bill into this Court against the said defendant, to which he put in his answer; and the said Elizabeth, about a year since, intermarried with one James Humphrey, who has not thought fit to revive the suit, and therefore it was prayed that the plaintiff's bill may stand dismissed out of this Court; whereupon it was ordered that the said Humphrey do, within a week after notice hereof, procure this suit to be revived, or in default thereof that the plaintiff's bill do stand dismissed out of this Court *with costs*, to be taxed by Sir Richard Holford, Knight, &c.—Reg. Lib. A. 1708, fol. 134.

Court of
Chancery,
1708.

Sole female plaintiff, after answer, intermarries. Order ex parte, that the husband should, within a week after notice of the order procure the suit to be revived, or, in default thereof, that the plaintiff's bill should stand dismissed, *with costs*.

Wilkinson v. Charlesworth.

Thursday, 31st July, 1832.—M. R.—Caroline Wilkinson, now Caroline Malcolm, plaintiff; Stephen John Charlesworth, and Louisa, his wife, Fursem Manners, John William Calvert, and

M. R.
July, 1832.

Bill by a sole female plaintiff. Cause stands over for want of

parties, with liberty to amend the bill. Plaintiff intermarried. Bill not amended. Suit not revived, and no further proceedings taken. Order upon petition of three of the defendants, that the plaintiff and her husband should file a bill of revivor on or before the first day of the next term; or, in default thereof, that the bill should stand dismissed *without* costs.

The petition prayed a dismissal with costs.

Alithea, his wife, Frederick Davenport, and Mary Ann, his wife, Edward Manners, Roger Manners, Jonathan Wagstaff Bryan, and Emma, his wife, Walter Manners, Otho Manners, Edward Pitches Wilson, and George Chisholme, John Byng Wilkinson and Harriet, his wife, Thomas William Hill, Edward Archdeacon, and Rosilia, his wife, Elizabeth Wilson, William Thompson, James Christian, Clement Bree, John Chapman, and John Wray, and George Payne, defendants.—Whereas the defendants William Thompson, James Christian, Clement Bree, and John Chapman, did, on the 23rd day of July instant, prefer their petition unto the Right Honourable the Master of the Rolls, setting forth that the plaintiff filed her bill in this Court against the petitioners and the other defendants above named, in or as of Hilary Term, 1828. That this cause came on to be heard before his Honor on the 14th day of June, 1830, when the same was ordered to stand over for want of parties, with liberty for the said plaintiff to amend her bill. That the said plaintiff on the 30th day of December, 1830, intermarried with and is now the wife of Robert Malcolm, of No. 1, Moore Place, Lambeth, in the county of Surrey, surgeon. That the said bill hath not been amended, nor hath the said suit been revived, and no further proceedings have been taken in this cause; and therefore praying that the said plaintiff and her husband, the said Robert Malcolm, may be ordered to file a bill of revivor within ten days after the service of the order to be made upon this petition, or that in default thereof the original bill might stand dismissed out of this Court with costs, to be taxed by the Master of this Court in rotation; and that the said Robert Malcolm be ordered to pay such costs when taxed. Whereupon all parties concerned were ordered to attend his Honor on the matter of the said petition, and counsel for the petitioners and for the said Robert Malcolm and wife this day attending accordingly—upon hearing the said petition, and the said order of the 14th day of June, 1830, read, and what was alleged by the counsel for the petitioners, and for the said Malcolm and wife, his Honor doth order that the plaintiff and Robert Malcolm her husband do file a bill of revivor against the defendants on or before the first day of next Michaelmas Term, or in default thereof it is ordered that the original bill do stand dismissed out of this Court *without* costs.—Reg. Lib. B. 1831, fol. 2359.

Guike v. Braddy.

Sir L. Shadwell.—Where a suit abates by the marriage of a female plaintiff before decree, I think that the defendant is entitled to an order that a bill of revivor be filed within a month, or in default thereof that the original bill shall be dismissed against him with costs.

V. C.
Nov. 1830.
Said abating by marriage of sole female plaintiff before decree. Order to which defendant is entitled.

See the two preceding cases—the order in *Johnson v. Horlock*, “with costs,” and the order in *Wilkinson v. Charlesworth*, “without costs.” In *Lee v. Lee*,* Vice-Chancellor Wigram says, that the practice in a case in which a sole female plaintiff marries cannot, in his judgment, be considered as settled.

Kemp v. Mackrell.

Monday, 19th Dec. 1748.—Mr. R. Charles Kemp, assignee of William Cardwell, bankrupt, and the said William Cardwell, by bill of revivor, plaintiffs; John Mackrell, defendant.—Upon motion this day made unto this Court by Mr. Pembroke, being of the plaintiffs’ counsel, it was alleged, that in Michaelmas Term, 1746, the plaintiffs exhibited their bill unto this Court against Thomas Mackrell, to be relieved touching the several matters therein complained of; to which bill, the said Thomas Mackrell appeared and put in his answer, and in Michaelmas Term, 1747, exhibited his cross bill into this Court, to be relieved also touching the several matters therein complained of; to which bill, the plaintiffs put in their separate answers, and, after an examination of witnesses, on the 16th day of July last, the said causes were heard, when it was ordered that the said Thomas Mackrell’s cross bill should stand dismissed out of this Court, with costs to be taxed by Mr. Holford, one of the masters, &c.; and, in the original cause, several accounts were directed to be taken by the said master. That before any proceedings were had upon the said decree, the said Thomas Mackrell died, leaving the said John Mackrell, his only son and heir at law, and having made his will, and appointed the said John Mackrell sole executor, and he, having duly proved the same, and the suit and proceedings being abated by the death of the said Thomas Mackrell, the plaintiffs exhibited their bill of revivor into this Court against the said defendant, to which he has appeared, and his time for answering being out, it was

L. C.
Dec. 1748.
The order to revive the suit and proceedings in *Kemp v. Mackrell*, 3 Ves. sen. 579, and 3 Atk. 812, in which Lord Hardwicke determined that the plaintiffs were entitled to the costs of the cross bill dismissed with costs, but which costs had not been taxed when the defendant died. Abstract of the order.—Original bill and cross bill—the two causes heard—when it was ordered that the cross bill should stand dismissed with costs, and in the original cause several accounts were directed to be taken. Before any proceedings were had on the decree, defendant (in the original cause) dies, plaintiffs (in

* 1 Hare, 618.

original
cause] having
filed a bill of
revivor
against his
heir and exe-
cutor—order,
that the suit
and proceed-
ings should
stand revived.
Remarks.

therefore prayed that the said suit and proceedings might stand revived, and be in the same plight and condition as they were in at the time they abated by the death of the said Thomas Mackrell, which is ordered accordingly.—Reg. Lib. A. 748, fol. 81.

The foregoing is the order to revive the suit and proceedings in *Kemp v. Mackrell*, 2 Ves. sen. 579, and 3 Atk. 812, in which Lord Hardwicke determined that the plaintiffs were entitled to the costs of the cross bill dismissed with costs, but which costs had not been taxed when the defendant died. This order to revive the suit and proceedings of course determined nothing as to the title of the plaintiffs against the defendant, the heir and executor, to the untaxed costs of the cross bill dismissed with costs. But it is thought that the language of the order may be useful with reference to Lord Hardwicke's judgment as reported in Ves. sen. and Atkyns. Nothing should be neglected which may possibly throw light upon the important point (as the Lord Chancellor has in a recent judgment [1848] styled it) of revivor for costs alone.

Coxe's MSS.
Sir Thomas
Clarke.
Nov. 1754.

In what cases
and how a
court of
equity will
marshal as
sets for pay-
ment of debts
and legacies.*

Davenhill v. Fletcher.

Michaelmas Term, 28 Geo. 2.—1754, 18th November.—Sir Thomas Clarke, Master of the Rolls, put the four following cases as all the cases in which a court of equity marshals real and personal assets for the payment of simple contract debts and legacies.

First, where there are specialty and simple contract debts and lands left to descend. In this case, if the specialty creditors take a satisfaction for their debts out of the personal estate, the simple contract creditors first, and then the legatees, shall stand in the place of the specialty creditors, for obtaining a satisfaction out of the lands to the amount of so much as was received by the specialty creditors out of the personal estate.

Secondly, where there are specialty and simple contract debts and legacies, and lands specifically devised. In this case, if the specialty creditors take a satisfaction for their debts out of the personal estate, the simple contract creditors shall stand in the place of the specialty creditors for obtaining a satisfaction out of the lands to the amount of so much as was received by the specialty creditors out of the personal estate. But here there can be no relief for the legatees, because there is as much equity

* This marginal placitum is by Coxe.

to support this specific devise of the lands as to support the bequest of the legacies.

Third, where the debts are charged upon the lands. Here the legatees shall have the personal estate towards their satisfaction, and if the creditors take it in or towards the discharge of their debts, the legatees shall stand in their place, pro tanto, to have a satisfaction out of the lands.

Fourth, where the simple contract debts and legacies are both charged on the lands. In this case the lands shall be sold and all paid equally.

See a subsequent page of the present volume.

Remarks.

Boughton v. Johns.

Sir John Leach.—An order that is a nullity must not be altogether disregarded. Disobedience to it would be unwise and dangerous. An application to discharge it is the proper and safe course.*

V. C.
Feb. 1820.
Order that is a nullity not to be disregarded.

Willmore v. Burrow.

Sir John Leach.—It deserves consideration whether it would not be expedient for the Court to show itself somewhat more lenient, where, sometimes from ignorance, and sometimes from neglect, there is a failure to comply with those rules of practice that limit the time within which certain proceedings must be taken. The infliction of costs is, in general, a sufficient punishment for the default.†

V. C.
Feb. 1827.
Failure to comply with some rules of practice.

Davis v. Davis.

Lord Cottenham.—A refusal by the Court below to restore a cause to the paper, may certainly be made the ground of an application here by way of appeal.‡

L. C.
Dec. 1846.
Refusal to restore cause to paper—Appeal.

* See *Chuck v. Cremer*, 1 Rep. temp. Cott. 338.

† See the remarks appended to the case of *Hemming v. Dingwall*, 1 Rep. temp. Cott. 14.

‡ See *Collins v. Price*, 1 C. P. Coop. 494.

L. C.
1714.

When specific legacies shall abate for payment of pecuniary legacies.

ABATEMENT OF LEGACIES.

Lord Cowper.—Will recites, that all testator's personal estate is at London and at York. The personal estate at London is bequeathed to A., and that at York to B.; and then pecuniary legacies are given to C., D. and E. The specific legacies to A. and B. shall abate in proportion to the value thereof, in order for the payment of the pecuniary legacies.—MS. Rep.

L. C.
1748.

Suit between mortgagees. Wilful default.

Ashurst v. Johnson.

Lord Hardwicke.—Suit between mortgagees, and the one having taken possession of the premises, nevertheless allows the mortgagor to receive part of the rents after the bill filed. This is wilful default, and he shall be charged with the amount.—Abridged from a cotemporary MS. Rep.

L. C.
June, 1752.
Infant—
Next friend.

Kinchant v. Pritchard.

Lord Hardwicke.—The statement of the next friend does not bind the infant plaintiff. The decree shall, notwithstanding such statement, be according to the facts arising.—MS. Rep.

L. C.
Nov. 1754.
Prayer for general relief
—Decree.

Birch v. Corbold.

Lord Hardwicke.—The prayer for general relief is a good foundation for any decree consistent with the case stated, but it is no foundation for a decree inconsistent with the case stated.—MS. Rep.

V. C.
Dec. 1819.
Abatement of suit by plaintiff's death does not prevent the enforcement of order that one defendant shall pay costs to another.

France v. Mills.

Sir John Leach.—An abatement of the suit by the death of the plaintiff does not prevent the enforcement of an order that one defendant shall pay costs to another defendant.*

V. C.
Nov. 1824.
They who

Attorney-General v. Jones.

Sir John Leach.—This Court necessarily exercises its jurisdiction where the visitors of a charity are also the trustees of its

* See *Jones v. Williams*, 1 C. P. Coop. 488.

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estates. They who receive and apply the rents of a charity are not the proper persons to exercise the visitorial powers.

See *Attorney-General v. Lubbock* [the case of Morden College].* The ensuing are some of the marginal notes:—

Directions in the will of the founder, giving the sole government and management of a charity to the visitors, does not shut out the jurisdiction of this Court when such visitors are also the trustees of the charity estates. —Matters in which the Court will interfere where same persons both visitors and trustees.—Under the Statute of Charitable Uses, 43 Eliz., a commission may be granted, the visitors being trustees also.—This construction adopted by the late charity commissioners.—The jurisdiction of the Court, where visitors have the application of the funds, is independent of the construction of the statute of Elizabeth.—Question upon expressions in the books ascribing to visitors in some cases a jurisdiction apparently superseding that of the Court.—Question of the Court intermeddling with matters of management and government unconnected with the revenue of charities.

receive and apply the rents of a charity, are not the proper persons to exercise the visitorial power.

Remarks.

SOLICITOR FILING AN INFORMATION INDEMNIFIES THE RELATOR.

V. C. March, 1836. The solicitor filing an information indemnifies the relator.

Sir L. Shadwell.—It appeared in the course of the trial of an issue, directed for the purpose of ascertaining whether the solicitor filing the information was authorized to use the relator's name (the jury finding in the affirmative), that the solicitor, in consideration of the relator authorizing the use of his name, has indemnified the relator. Under these circumstances, the information must be taken off the file, and the solicitor must pay all the costs.†

V.

Decisions and Dicta of Sir EDWARD SUGDEN, when Lord Chancellor of Ireland.—Nov. 1834—April 1835, and Sept. 1841—July 1846.

[Continued from p. 54.]

AGENT.

QUESTION whether a desire in a will that Mr. L. should be retained as agent over an estate was or was not imperative and

Desire in will that Mr. L. should be retained as agent.

* 1 C. P. Coop. 15.

† See *Attorney-General v. Skinners' Company*, 1 C. P. Coop. 7. See the case of *Attorney-General v. Tyler*, reported in a subsequent number of this publica-

Relator; written authority.

Agent. binding on the tenant for life taking under the will.—*Lawless v. Shaw, Llo. & Goo. 154.**

Removal. The Lord Chancellor said that if Mr. L. were to oppose the will of his employer and conduct himself improperly he should remove him without any hesitation, and the Court had power to do so; as circumstances would then arise which the testator did not contemplate.—S. C.

Agent employed to settle a debt. Lord Chancellor.—The general rule is that an agent cannot buy for his own benefit: that it is his duty, on behalf of his employer, to settle the debt on the best terms he can obtain; and if he is employed for that purpose and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle.—*Lawless v. Mansfield, 1 Dru. & War. 557; S. C. 4 Ir. Eq. Rep. 113.*

The rule is a simple one, and grounded upon this, that no man can serve two masters. If a party undertake to act for another, he must act for his benefit, and cannot, in the same transaction, act for himself as a principal.—S. C.

See a subsequent page, "Trustee and cestui que trust."

One who was agent, receiver and trustee, receives an improper lease. Lord Chancellor.—See how the case stands, A. B. was one of the trustees of the legal estate under the will. He had an annuity of 100*l.* a year given him for acting as receiver and manager of that very estate. He had great confidence reposed in him by the testator, and therefore was made trustee. The tenant for life under the will grants a lease, which this man of business takes, and takes at an inconsiderable rent, and which purports to have been given as a reward for long and faithful services. This lease is for sixty-one years, at a rent of 25*l.* a year. Now, am I to be at liberty to let this gentleman deal in that way with the estate? Can I suffer a trustee under the

tion, and the remarks on a provision of the Improvement of Jurisdiction of Equity Act (15 & 16 Vict. c. 86, s. 11), requiring that before the name of any person is used as relator in an information, he shall sign a written authority.

* This was a rehearing of a decree of Lord Plunkett dismissing the agent's bill to establish his right. Sir E. Sugden reversed Lord Plunkett's decision and established the right of agency. Upon an appeal from this last decree to the House of Lords, the decree was reversed, and Lord Plunkett's decree restored. *Shaw v. Lawless, 5 Cl. & Fin. 129.*

See the observations upon this case in Sir E. Sugden's "Treatise of the Law of Property as administered by the House of Lords," pp. 394—400.

will—an agent under a will, who received payment for his agency—with knowledge of the persons and trusts for whom and for which he was made trustee, to come into a Court of Equity and tell the Court that he obtained from a tenant for life, who had no such power, for whom he was made express trustee, that he took a lease, not merely for the life of this gentleman, which was all he had a right to grant, but that he took an absolute gift for sixty-one years. It was a fraudulent transaction. He was not at liberty, from the character which he filled, in the view of a Court of Equity, to receive this lease from his employer for whom he was agent, receiver and trustee. No man, knowing that he is dealing with a person, who has only a limited interest, can justify in the face of that knowledge taking a lease from that person for an absolute term so as to enable him to deceive a fair purchaser. I must consider this case in equity, aye and beyond equity, as marked with fraud.—*Kerr v. Dungannon*, 1 Con. & L. 335; S. C. 1 Dru. & War. 509; 4 Ir. Eq. Rep. 343.

AGENT.

It is for the receiver dealing thus with his employer to show, and he is bound to show, that he is dealing for value—that is to say, not exactly for value, because the employer may give him a present, but he is bound to show that the principal had all the knowledge which he had, and that it was a fair dealing between them. But here the receiver, who had the legal estate, obtains a lease from the tenant for life of an equitable estate for a longer time than he was entitled to grant under the power in the will, and subject to no contingency. I will allow no man to come into court and set up a title thus concocted in fraud of the persons entitled in remainder.—S. C.

Here is a trustee whose duty it was to stand by and protect the estate. It was his bounden duty, as trustee, to do no act which would impeach the title of his cestui que trust. Yet that is the immediate and necessary consequence of his act in taking this lease, which he now insists ought to be supported; I am called on to support a dealing between the tenant for life and the trustee, the tendency of which is not to effectuate the intention of the testator, but to enable him, this paid trustee, agent and receiver, to disturb the whole of the will by which he is made trustee, which he was bound to protect, and which he comes here to defeat. It is a transaction which a Court of Equity is bound to mark with its strongest reprobation.—S. C.

Lord Chancellor.—It is not denied that an agent may take a lease from his principal.

AGENT. lease from his principal. A great case has established this, but it must always be difficult to sustain such a lease in this court. It must be proved, that full information has been imparted, and that the agreement has been entered into with perfect good faith. Here every thing is wanting, which could support this case.—*Molony v. Kernan*, 2 Dru. & War. 38.

Party buying from agent with notice.

A party who buys from an agent, with distinct notice that the party with whom he is dealing is an agent, has cast upon him the liability of sustaining the lease, just as much as the agent himself; and if the lease could not be upheld by the agent, neither could it be supported by a purchaser from that agent, if he deals with him in his character of agent.—S. C.

Lease set aside.

The Lord Chancellor said he was bound to set aside the lease. The relations of agent, receiver and tenant were added to that of standing by delegation in the place of guardians.—*Mulhallen v. Marum*, 3 Dru. & War. 317.

Statute of Frauds.

The Statute of Frauds requiring a promise made upon consideration of marriage to be in writing, signed by the party to be charged or some person by him lawfully authorized, and it being settled that the agent may be appointed by parol, the question in the cause was whether the agent was lawfully constituted.—*Greene v. Cramer*, 2 Con. & Law. 54.

Bill by representatives of employer and client against agent and solicitor—no settled account.

Bill by representatives of employer and client against agent and solicitor. No settled account. The Lord Chancellor said that although the bill prayed that the plaintiffs might be at liberty to surcharge and falsify the accounts of the defendant, yet as, in point of fact, there had been no account stated and settled between them, there could be no question as to surcharging or falsifying. An account must be directed.—*Walsh v. Studdart*, 4 Dru. & War. 159; S. C. 2 Con. & Law. 423; 6 Ir. Eq. Rep. 161.

Lease granted by principal agent to his under-agent set aside.

The Lord Chancellor said, when he looked at the situation of the parties and the time when the lease was executed—when he found that the agent was at that period in pecuniary embarrassments, that within a very short time afterwards he left his residence and absconded, he (the Lord Chancellor) must say that his conduct prevented him from placing any confidence in his acts. The principal agent granted the lease to his under-agent just at the moment when he was about to quit the country. Under those circumstances he thought that that was a case in which a Court of Equity was bound to interfere.—*Rossiter v. Walsh*, 4 Dru. & War. 485; S. C. 2 Con. & Law. 562.

Held, that no question could arise on the Statute of Limitations, credit being taken in account for two payments by agent on foot of a debt, and allowed by the principal.—*Forster v. Thompson*, 2 Con. & Law. 568 ; S. C. 6 Ir. Eq. Rep. 168.

Lord Chancellor.—There is no doubt that if, in the course of dealing between a principal and agent, interest has been charged on the balance in the hands of the agent, and that principle has been acted on for a length of time, the court will act upon the same principle in taking their accounts.—*Batemans v. M'Elligott*, 7 Ir. Eq. Rep. 471.

No interest was charged in an agent's accounts previously to a certain time. In the next account the agent, in his own handwriting, charged himself with interest, and that account was stated and settled between himself and his principal. Then, the relation continuing, he continued to receive and also continued not to pay, and at last, shortly before his death, he rendered an account, not charging himself with interest. The Lord Chancellor said if that had been a settled account and on the settlement interest was not charged, he should consider that that introduced a new course of dealing ; but that account was only rendered ; that account was in no particular ever treated as a stated and settled account, but was only an account rendered. That account could not absolve the agent from the obligation to pay interest on the balances in his hands, which was clearly to be implied from his charging himself with the interest for several years immediately previous.—S. C.

Lord Chancellor.—It is said that there is no proof that the lands were sold at an undervalue, but it is perfectly well settled that it is not necessary to prove undervalue. A principal selling to his agent is entitled to set aside the sale upon equitable grounds, whatever may have been the price obtained for the property.—*Murphy v. O'Shea*, 2 Jo. & Lat. 422 ; S. C. 8 Ir. Eq. Rep. 329.

The case is one not merely of an agent who had his principal in his power, but one in which the agent had full knowledge of the rule of the court ; which, however, does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's-length, and after a disclosure of all that he knows with respect to the property.—S. C.

One thing admits of no dispute ; the moment it appears in a transaction between principal and agent, that there has been any underhand dealing by the agent, that he has made use of another

AGENT.
—
Statute of Li-
mitations.

Question as
to charging
interest on
agent's ba-
lance.

Principal
sells to agent.

Underhand
dealing by
agent.

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person's name as the purchaser, instead of his own, however fair the transaction may be in other respects, from that moment it has no validity in this court.—S. C.

Question as to specific performance of contract for lease made by agent of tenant for life, with power to lease at the best rent—undervalue alleged.

Question as to specific performance of contract for lease made by agent of tenant for life with power to lease at the best rent; undervalue alleged. Lord Chancellor.—I think an agent is bound to let the lands of his principal to the best advantage; and though I do not agree that the rent is to be weighed in the same scales whether a man is acting as owner or as agent, yet I agree that, if this be not a contract for a lease at the best rent, it is not to be enforced. But I do not desire to be understood that, either in the case of a purchase or lease, upon the ground of mere undervalue, a *bonâ fide* letting or sale, which would be binding on the principal himself, will not be equally binding on him where he acts through his agent, if that agent has acted fairly and honestly. I could not do a more mischievous thing than to avoid a contract *bonâ fide* entered into by an agent, because it is proved that the property was worth a shilling or two more rent than he obtained for it.—*Dyas v. Cruise*, 2 Jo. & Lat. 460; S. C. 8 Ir. Eq. Rep. 407.

[To be continued.]

SENDING PARTIES TO COMMON LAW.

Sending parties to common law.

Another grievance is, that my Lord [Chancellor] refuseth to the suitors help in equity until he has sent them to the Common Law. This too, his lordship doth not once only, but it may be twice, nay, even three times.—Chancery Grievances, a MS. of the Seventeenth Century.

Remarks.

By Improvement of Jurisdiction of Equity Act court may itself determine legal right without requiring parties to proceed at law.

By the Improvement of the Jurisdiction of Equity Act, 15 & 16 Vict. c. 86, sect. 62.—In cases where, according to the present practice of the Court of Chancery, such court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said court may itself determine such title or right without requiring the parties to proceed at law to establish the same.

King v. Cant.

In this case a fictitious estate was mortgaged to the plaintiff by forged deeds, which security, the defendant Cant, an attorney, procured for the plaintiff, at the recommendation of another attorney, one Porter, who is gone off. Bill is brought against Cant to make him liable either as a party to the fraud, or upon account of his gross neglect in recommending a security to his client which he knew nothing of.

Lord Chancellor [Lord Hardwicke] said, that if an attorney is guilty of gross neglect in his client's business, especially in lending money on securities which he is to procure, he will be liable to make a satisfaction to his client in this Court. But in a case of this sort, it will be very hard to make the attorney liable; for very often the existence of the estate is taken by him on information, if at a distance; and it is not properly his business to look to the sufficiency of the estate, unless he particularly undertakes it. But as to the point of his being particeps criminis, he directed an issue, viz., whether he knew that this was a fictitious security or was privy to the fraud of Porter; for although the Court seldom sends matters of fraud to a jury, yet here a fraud is admitted, and it is a mere question of fact whether he was privy. The only witness of fraud for the plaintiff was one Mr. Ashton, who was dead, and therefore, by the rule of the Court, the defendant's answer was read in evidence, and lest he should suffer by the trial at law, Lord Chancellor directed the answer to be read in evidence to the jury, because it is evidence here as this case is circumstanced, and cited *Hotson v. Rodda*, Lord Cowper, and *Cæsar v. Oglethorpe*, Lord King, where it was so directed.

Joddrell
MSS.^a
L. C.
June, 1743.
Attorney guilty of gross neglect in his client's business liable to make satisfaction in this Court.
Court seldom sends matter of fraud to a jury.
Issue directed, whether the attorney was privy to a fraud.
One witness of fraud for the plaintiff—Answer directed to be read in evidence to the jury.

Randell v. Morgan.

Lord Eldon.—A document not used at the first hearing, if it is of such a kind that it can be proved *vivâ voce*, may (the usual order of course for leave to prove must however be obtained) be used upon the rehearing.†

L. C.
Feb. 1822.
Document—
Rehearing.

* See 1 Rep. temp. Cott, 544, note (b). See also the author's "Treatise on Limitations and Provisions in Marriage Settlements in Favour of Collaterals," p. 46, in the note.

† See *M' Mahon v. Burchell*, 1 Rep. temp. Cott. 478.

V. C.
May, 1818.

It is a convenient practice that evidence, the admissibility of which is doubtful, should be read de bene esse.

Edwards v. Faithfull.

Sir J. Leach.—It is a convenient practice that evidence, the admissibility of which is doubtful, should be read de bene esse. It very often turns out that the evidence objected to cannot possibly have any influence upon the decision of the Court. It is wholly immaterial therefore whether the evidence is used or not, and yet the discussion of the admissibility of such evidence is commonly productive of very great waste of time. This is an evil which, in the present state of business, it is highly desirable to avoid, and in a great number of cases the practice I have mentioned will enable us to do so.*

L. C.
July, 1846.

As to deposition allowed to be read de bene esse.

Watson v. Parker.

Lord Cottenham.—Where a deposition is allowed by the court below to be read de bene esse, it is still necessary that it should be ultimately determined whether it is to be admitted or rejected; and it is necessary that it should be so determined when the decree comes to be pronounced. There may be an appeal from the decree, and it would obviously be extremely inconvenient for the Appellate Court to be left in ignorance whether the deposition in question was, or was not, part of the evidence upon which the decree is founded.†

V. C.
March, 1823.
Evidence.

Brown v. Brown.

Sir John Leach.—Evidence is, in general, available against such defendants only as were parties to the cause when it was taken.‡

V. C.
Feb. 1823.
Evidence.

Todd v. Disnoss.

Sir John Leach.—You may use your evidence against the real and personal representatives of the parties in whose presence it was gone into.

* A reference to *Lee v. Harrison*, 1 C. P. Coop. 503, may be convenient to the practitioner. Objection to evidence, which comes before the case is closed, is not too late.

† See the observations in the note, 1 Rep. temp. Cott. 57, 58.

‡ See *Dixon v. Allen*, 1 C. P. Coop. 492; and *Pretty v. Parker*, 1 Rep. temp. Cott. 38.

Howard v. Hall.

Sir John Strange.—The rule that there shall be no revivor for costs, the Lord Chancellor [Lord Hardwicke] has said is often very hard and unjust. His lordship thinks it has been too much insisted upon, and that the Court does right to endeavour to get out of it. Several exceptions have been made. One exception is where the costs are to come out of assets. There they shall not be lost by the party's death. It is the same thing where there is land or money out of which they are to be paid. There may then be a revivor for costs.

M. R.
March, 1754.
Revivor for costs. Where the costs are to come out of assets they shall not be lost by the party's death. Where there is land or money out of which the costs are to be paid, there shall be a revivor for them.

Remarks.

The author has a MS. note that a case of *Howard v. Hall*, decided by Sir J. Strange being mentioned to Lord Hardwicke upon a discussion of the practice respecting revivor for costs, (it was at a hearing at Powis House,) his lordship expressed his approbation of it. See further a subsequent number of this publication.

Chapman v. Chapman.

Sir J. Leach.—In bill by cestui que trusts against their trustees, it sometimes happens that one of the trustees, whilst he is known to have received nothing, has nevertheless incurred considerable costs, charges and expenses. In that case the plaintiffs have obviously no interest in taking an account against him, and should he die before decree, it is plain they would file no bill of revivor against his representatives. But are the representatives to lose such costs, charges and expenses? That would be an injustice which I am of opinion that this Court will not permit. It will find some mode of reimbursing the estate of the deceased trustee whatever may be due to it in respect of his having acted in the trust.*

V. C.
March, 1824.
Bill of cestui que trusts against trustees, one of whom having incurred considerable costs, charges and expenses, dies before decree, and no bill of revivor filed against his representative.

Graham v. Edwards.

Sir J. Leach.—It is said that one of the plaintiffs is dead and that the suit is consequently abated. There seems to be good ground for believing this to be the case. If, however, it is disputed, there must be an inquiry upon the subject, and the cause must stand over until the result is ascertained.†

V. C.
April, 1825.
One of plaintiffs said to be dead, and suit abated.

* See the note to *Kampf v. Jones*, 1 C. P. Coop. 13. Death of one of three trustees, no provision having been made for his costs.

† See the case of *Reynolds v. Dickson*, reported in a subsequent number of this publication.

V. C.
June, 1831.
Sole plaintiff
in original
suit having
died before
decree, and a
bill of revivor
having been
filed, but no
order to re-
vive the ori-
ginal suit
having been
obtained—
Order, upon
application of
one of the de-
fendants in
the original
suit and the
suit to re-
vive, that the
plaintiffs in
the suit to re-
vive should
revive the
original suit
within four-
teen days
after the ser-
vice of the
order, or,
in default
thereof, that
the plaintiffs'
bills should
stand dis-
missed against
such defend-
ant with costs
of the second-
mentioned
suit (suit to
revive), and
the costs of
the applica-
tion.

Troward v. Bishop of Lincoln.

Thursday, 9th June, 1831. V. C.—William Troward, plaintiff, George, Lord Bishop of Lincoln, Richard Bingham, Thomas Foster, John Devereux, John Goodeve, George Merrifield, John Elliott, Robert Fisher Gills, Joseph Bingham, Robert Hele, Selby Hele, Mary Parker, William Wayman and Henry Osborne, defendants, by original and amended bill; and between William Troward and Elizabeth Troward, spinster, plaintiffs, the said George Lord Bishop of Lincoln, Richard Bingham, Thomas Foster, John Devereux, John Goodeve, George Merrifield, John Elliott, Robert Fisher Gills, Joseph Bingham, Robert Hele, Selby Hele, Mary Parker, William Wayman, and Henry Osborne, defendants, by bill of revivor; Upon opening of the matter this present day unto this Court, by Mr. Jacob, of counsel for the defendant Robert Fisher Gills, it was alleged that it appears by the affidavit of the said Robert Fisher Gills that the deponent is informed and believes that in or about the month of June, 1826, a subpoena to appear to a bill of revivor at the suit of the above-named William Troward and Elizabeth Troward had been served upon the said defendant's attorney or agent, and to which an appearance was duly entered for the said deponent with his authority, and an office copy of the said bill of revivor obtained and taken on his part, but no order to revive the original and first above mentioned suit has been obtained, as the said deponent hath been informed and verily believes; on the contrary, he says, that the said original cause being set down for hearing, a note was addressed and sent by Mr. Robert Whitby, who, as the said deponent is informed and believes, was the solicitor or agent of the above-named plaintiffs, to Messrs. Holmes, Frampton and Loftus, the agents of the said deponent in these causes, of which the following is a copy, viz.:—"Buckingham Street, 3rd July, 1826. Gentlemen—Troward v. Bingham.—It is the intention of the plaintiffs not to proceed any further in the suit; as such is the case you will not deliver your briefs to counsel on the hearing, no order having as yet been obtained to revive; and am, gentlemen, your obedient servant, Robert Whitby. Messrs. Holmes, Frampton and Loftus, New Inn." And the said cause was afterwards, as the said deponent understands, struck out of the paper. That Thomas Bingham, a son of the above-named defendant Richard Bingham, was, previously to the filing of the said bill of revivor,

appointed receiver of the rents, issues and profits of the vicarage in the pleadings of these causes mentioned, and is, as the said deponent verily believes, still in the receipt thereof, but hath not, as the said deponent hath been informed and verily believes, ever passed any account thereof; and the said deponent saith that he is a very considerable incumbrancer upon the said rents and profits; but by reason of the said original cause having become abated by the death of the plaintiff, and no order to revive having been since obtained by the plaintiffs in the said last-mentioned suit, he the said deponent is, as he is advised, unable to compel the passing of the said receiver's accounts, or in any way to proceed with the suit or to obtain the said rents and profits or any part thereof. It was therefore prayed that the plaintiffs in the last-mentioned cause might revive the suit within fourteen days, or that the same might stand dismissed out of this Court as against the said Robert Fisher Gills, with costs to be taxed by one of the Masters thereof, for want of prosecution. Whereupon and upon hearing Mr. Lovat, of counsel for the plaintiffs, and the said affidavit of the said Robert Fisher Gills read, this Court doth order that the plaintiffs in the last-mentioned cause do [revive this suit]* within fourteen days after service of this order, or in default thereof it is ordered that the plaintiffs' bills do stand dismissed out of this Court as against the said defendant Robert Fisher Gills, with costs of the second-mentioned suit and the costs of this application to be taxed by the Master of this Court in rotation.—Reg. Lib. B. 1830, fol. 2607.

This is obviously the order in *Troward v. Bingham*† although the date there attributed to it is the 22nd instead of the 9th June. It is there stated that the order was that if the executor did not procure an order to revive within a given time, the bill of revivor should be dismissed with costs. This statement of the order occasioned the Vice Chancellor Wigram to remark in *Lee v. Lee*‡ that the order being confined to the bill of revivor and not extending to the original suit, showed the opinion of the Court to have been that it could not deal with the abated suit. It will be seen, however, from the order as printed above, that the Court did deal with the abated suit.—See now the 63rd General Order of May, 1845.

Mann v. Copland.

Sir Thomas Plumer.—Where there is a clear intention to

V. C.
July, 1817.
Demonstrative bequest.

* The registrar's book, instead of the words between crotchets, has "do file a bill of revivor." This is plainly an error of the copying clerk.

† 4 Sim. 483.

‡ 1 Hare, 617.

bequeath an annuity, that intention will not be defeated because the annuity is directed to be paid out of the rents of a freehold house, and the will is not executed to pass real estates; nor will the intention be defeated because part of a fund is directed to be set aside to answer the annuity, and it turns out that there is no such fund. The bequest is demonstrative and not specific. It must be made good out of the general personal estate.

Remarks.

These dicta were noted by the author during the argument of *Mann v. Copland*.*

In *Creed v. Creed*,† Lord Cottenham says there are many cases in which, though a legacy be charged upon a particular fund, it does not fail by failure of the fund, which are called "demonstrative legacies;" but these all proceed upon the construction showing a general intent. Such was the case of *Fowler v. Willoughby*.‡ But in such cases, if the particular fund be applicable, the legatee is entitled to the benefit of it in preference to others having only a general claim. Such was the case of *Acton v. Acton*.§

In the report of Lord Cottenham's judgment in *Creed v. Creed*,|| there is a remark upon the case of *Mann v. Copland*, containing an error of the press, which it may be convenient to notice. The words of the report are "in *Mann v. Copland*, an annuity made payable out of the rents of a house was held to be payable out of the general estate, the devise of the house failing. But the decision would have been the other way if Sir Thomas Plumer had found upon the face of the will what he thought sufficient to prove that the testator meant to give a sum out of his personal estate to be set apart as a fund for the payment of the legacy."

Instead of "if Sir Thomas Plumer had found" we should read "if Sir Thomas Plumer had *not* found."

See *Rogers v. Clarke*,¶ Legacies demonstrative or in the nature of specific legacies.

DECREES AND DECRETAL ORDERS UPON MOTION AFTER ANSWER AND BEFORE ANSWER.

Decrees and decretal orders upon motion after answer and before answer.

Lord Langdale, A.D. 1840.—In specific performance suits, Lord Rosslyn first directed a reference as to the title upon motion after answer. Lord Eldon followed his example, and in some instances, I believe, directed such a reference before answer.**

* 2 Madd. 223. † 11 Cl. & Fin. 509. ‡ 2 Sim. & Stu. 354.

§ 1 Merivale, 178. || 11 Cl. & Fin. 509. ¶ 1 C. P. Coop. 376.

** See the Treatise of Vendors and Purchasers, p. 203, 6th edit.

The Chancery Commissioners [1826], if I remember right, recommended that this practice should be applied to all descriptions of suits,* and the general orders of May, 1839, have in some sort carried out their recommendations.† The time is probably not far distant when it will be found beneficial to the suitors, that the practice in question should have a still wider operation. In numerous cases decrees or decretal orders may very advantageously be made upon motion as soon as the answers are in, and in some cases before they are in.—Notes of Conversations of eminent Lawyers.

The ensuing provisions are contained in the Improvement of the Jurisdiction of Equity Act, 15 & 16 Vict. c. 86. Sect. 15. The plaintiff in any suit commenced by bill shall be at liberty at any time after the time allowed to the defendant for answering the same shall have expired, (but before replication,) to move the Court, upon such notice as shall in that behalf be prescribed by any general order of the Lord Chancellor for such decree or decretal order as he may think himself entitled to; and the plaintiff and defendant respectively shall be at liberty to file affidavits in support of, and in opposition to, the motion so to be made, and to use the same on the hearing of such motion; and if such motion shall be made after an answer filed in the cause, the answer shall, for the purposes of the motion, be treated as an affidavit.

Sect. 16. Upon any such motion for a decree or decretal order it shall be discretionary with the Court to grant or refuse the motion, or to make an order, giving such directions for or with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right.

Olden v. Simpson.

Sir John Leach.—The whim of a plaintiff is no sufficient reason for this Court making an order to enable him to put off that character, when he has once willingly assumed it. If justice cannot be so conveniently administered unless he be made a defendant, then the Court may properly be called upon to interfere.

These dicta correspond with the doctrine of Lord Cottenham in the *Attorney-General v. Cooper*.‡ There the application was, that the names of eight of the relators might be struck out of the information; but the principle is obviously the same as if the application had been that the names of

V. C.
May, 1836.
The whim of a plaintiff is no sufficient reason for this Court making an order to enable him to put off that character, when he has once willingly assumed it. If justice cannot be so conveniently administered unless he be

* Propositions 137 and 138.

† See the 5th Order.

‡ 3 Myl. & Cr. 258.

made a defendant, then the Court may properly be called upon to interfere.
Remarks.

eight of the plaintiffs (all having a similar interest in the subject) might be struck out of the bill. The ensuing extract from the judgment renders any statement of the circumstances of that case unnecessary. "Then I am to consider whether there is ground for the application made by the relators, that they may have leave to strike out the names of eight of themselves. It cannot be justly said that all that the relators have to establish in support of such an application is that the defendants will not be prejudiced by such an alteration; they must show that justice will not be done, or that the suit cannot be so conveniently prosecuted unless the alteration is made. I cannot give them such an advantage as they ask, and permit them to alter the record, merely because they may have a different wish at one time from that which they may have at another time, which may be the result of mere caprice. Nothing has been said to show that there is the least necessity for this alteration, beyond a mere matter of feeling; that as the persons in question are members of the corporation, they do not wish to be relators in a suit against the corporation. That is no ground for the alteration. They may act upon that feeling if they think fit, by taking the course which has been mentioned at the bar, namely, by procuring the dismissal of this information, and then another might be filed the next day at the relation of the other relators only; but I cannot give the assistance of this Court for that purpose by means of a special order, unless I consider that justice requires that the alteration should be made. I do not raise any question as to the power or jurisdiction of the Court to give liberty to make such an amendment as is desired, but no facts have been brought before me to justify me in giving that liberty."

See also the language of the Vice-Chancellor in *Jackson v. Burton*,* the passage beginning "the plaintiff desires that his name may be struck out, simply because he has changed his mind and is reluctant that the suit should be any further prosecuted."

TAKING OF ACCOUNTS CONDITIONAL.—CREDITOR PROCEEDING AT LAW.

L. C.
July, 1846.
Taking of accounts conditional.—Creditor proceeding at law.

Lord Cottenham.—Where the decree is of such a nature that the taking of the accounts of a testator's debts and estate is conditional—where it depends upon a circumstance which is doubtful—upon some event that has not yet happened—it is not the practice of the Court to restrain a creditor from proceeding at law; it would obviously be most unjust to do so.†

* 2 Rep. temp. Cott. 213.

† See *Ranken v. Harwood*, 1 Rep. temp. Cott. 293. See also the author's observations in the note to *Smith v. Guy*, 2 Rep. temp. Cott. 291. Suggested

ENTRY OF APPEARANCE WITH THE REGISTRAR.

Where a party who has not appeared to bill, disputes the regularity of process served upon him, the Court will not permit him to make any application to set aside such process until he has entered his appearance with the registrar.—Old MS. Chancery Practice.*

Entry of appearance with the registrar.

STATUTE OF LIMITATIONS.

Mr. HART, A.D. 1820.—There is a statement that occurs in our books not unfrequently—that our Courts of Equity act *only* by analogy to the Statute of Limitations. Lord Redesdale has had occasion to point out how inaccurate that statement is.—Notes of Conversations of Eminent Lawyers.†

Statement that our Courts of equity act *only* by analogy to the Statute of Limitations.

Smythe v. Attorney-General.

Lord Apsley.—In bill to perpetuate testimony these things are requisite:—Statement of the subject upon which the evidence is desired—Statement of plaintiff's title to such subject—and statement of defendant's interest to question the plaintiff's said title.—MS. Rep.

L. C.
Nov. 1777.
Bill to perpetuate testimony.

Hinde v. Hinde.

Sir John Leach.—In redemption or foreclosure decrees, a mortgagee is not entitled to have a direction that the costs of an action of ejectment, which he has brought, shall be added to his principal and interest and costs of the suit, when the pleadings are silent as to any such proceeding as an action of ejectment having been taken.‡

V. C.
April, 1824.
Redemption or foreclosure decrees.—Costs of ejectment.

Sanders v. Norton.

Sir John Leach.—The bill may be silent as to wilful default by the executors, yet still if the Master's report shows it, the

V. C.
Dec. 1822.
Wilful default by executors.

objection to some suits, instituted with the view only of protecting executors, that, from the frame of them, the decree must make the taking of the accounts contingent upon the Master finding that all persons belonging to a class are present, and consequently that until the Master has found that all the persons constituting the class are present, and has commenced, or is about to commence, the taking of the accounts, a creditor proceeding at law cannot be stopped.

* See *Parker v. Newcomb*, 1 Rep. temp. Cott. 21.

† See 1 C. P. Coop. 197, and 1 Rep. temp. Cott. 584.

‡ See *Millar v. Major*, 1 Rep. temp. Cott. 550.

order on further directions should direct an inquiry on the subject.*

MODE OF HEARING A CAUSE, SEVENTEENTH CENTURY.

Mode of hearing a cause, seventeenth century.

The mode of hearing before my Lord [C.] is as ensueth ;— The junior counsel of the plaintiff discreetly and succinctly stateth the purport and effect of the bill ; and the junior counsel of the defendant the purport and effect of the answer. Then the senior counsel of the plaintiff addresses his lordship, and the proofs for the plaintiff are read by his Six Clerk, and the junior counsel of the plaintiff, peradventure, maketh some observations. After that cometh the senior counsel of the defendant, and the reading of the proofs for the defendant by his Six Clerk followeth ; and then it chanceth, sometimes, that his junior counsel offers apposite remarks ; after which the plaintiff's senior counsel delivereth his reply. Lastly, my lord pronounces his judgment, the minutes whereof are forthwith put into writing by the registrar, and read over in the presence of his lordship and of the counsel and the parties concerned, and the proceeding is thus solemnly concluded.—From a MS. Book of Practice. Reign of Charles II.

SUBJECT OF LITIGATION, LAND.—PRODUCTION AND INSPECTION OF DEEDS.

Subject of litigation, land—Production and inspection of deeds.

Say—the subject of the litigation between plaintiff and defendant being land—the title being equitable—that the deeds belonging to the land are in defendant's possession, and, of course, relate to the matters in dispute, and the truth of such matters may appear by such deeds :—it does not follow that for that reason there is any right to a production and inspection ; that right will depend upon the nature of the title alleged by the respective parties—the extent to which the plaintiff's title is acknowledged or controverted by the defendant, &c.—Abridged from the MS. Notes of a Practitioner of the last century.

LAND.—PRODUCTION AND INSPECTION OF DEEDS.

Land—Production and inspection of deeds.

If deeds belong to the land, a plaintiff, until he has established his right to the land, cannot have the production and inspection of the deeds.—Abridged from the MS. Notes of a Practitioner of the last Century.†

* See *Clarke v. Johnson*, 2 Rep. temp. Cott. 219.

† See before, pp. 35—37.

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AGREEMENT.

Distinction between a mere voluntary agreement, and a voluntary agreement to provide for a wife or child.

In *Moore v. Crofton*, 3 Jo. & Lat. 442, the Lord Chancellor said—As to *Ellis v. Nimmo*, I think it was decided upon sound principles of equity; but I am aware that the opinion of the profession is otherwise. Before that case was decided there was a general impression that a voluntary contract, though meritorious, could not be enforced in this Court, and that impression has not been removed. I drew the distinction between a mere voluntary agreement, and a voluntary agreement to provide for a wife or a child; I did not carry it further, which I thought, and still think, ought to be enforced; but I consider that decision to be overruled by the current of opinion and authority, and I have no desire to support it against the general opinion.

A man contracts for the sale of an estate which he has not at the time.

Lord Chancellor.—In cases of contract, if a man contracts for the sale of an estate, which he has not at the time such contract is entered into, and he afterwards acquires such an interest as will enable him to make good his contract, this Court will compel the party to perform such contract, and make good the title.—*Jones v. Kearney*, 1 Dru. & War. 134; S. C. 1 Con. & Law. 34; 4 Ir. Eq. Rep. 74.*

performance against husband who, for love and affection, agrees to convey land in trust for his wife.—Old Notes in the Flyleaf of the 1st Edition of Cases of Chancery, published 1697.

Where the consideration is love and affection only, yet the leaning here is for the enforcement of the contract against the husband in favour of his wife, and against the father in favour of his child.—The Editor's American Correspondence.

* See the argument for the plaintiff in *Bensley v. Burdon*, 2 Sim. & Stu. 519.—It is quite clear that, if a person assumes to sell an estate in which he has then no interest, and he afterwards acquires an interest, this Court would, on a bill being filed against him by the purchaser, compel him to execute a conveyance.

The Editor was one of the counsel engaged in that case, and cited a passage from the Digest, if he recollects right, which was thought to be no unapt illustration of the question in discussion. Sir J. Leach, a few days afterwards, expressed a wish to be furnished with any similar passages that the editor's reading might have made him acquainted with. A paper was accordingly drawn up by the Editor containing all that he could find in the "Corpus Juris," and the best commentators upon it, and it is fortunate for the practitioner that this note is written at a place [Denton Court] where there is no access to the sources from which the paper was derived, for it would be very difficult to resist the temptation to insert the same passages here; as Sir J. L. on many occasions when the Editor, in common with some other members of the chancery bar, partook of his hospitality (he was famous for hospitality beyond all judges his contemporaries), observed that the passages afforded a very good example of the assistance that our equity system might derive from a knowledge of the remains of the Roman jurisprudence.

Lord Chancellor.—In the case of *Morse v. Faulkner* [1 Anstr. AGREEMENT 11; 3 Swanst. 429]—a man sold an estate, believing himself entitled to it; it turned out that he had no title to the lands at that time, but subsequently they descended on him: he died without perfecting the conveyance, and the purchaser filed a bill against his heir. The Court there held, that the contract might have been enforced against the seller if the purchaser had come in time; but doubted whether the contract, having been entered into by one not at the time entitled, could be considered as binding on the heir, viewing it as a personal equity attaching on the conscience of the party himself, and not descending with the land. I own I cannot see the distinction; I always thought that no good reason could be given why the contract should be binding upon the ancestor and not upon the heir; however, I do not mean to give any judicial opinion upon the point.—S. C.

The cases seem to me to establish this, that if a man sells an estate (and the principle is just the same if he grants his lands in mortgage or creates an annuity issuing out of them), and the title is afterwards defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title.—S. C.

No one will dispute this, that if a lessee have a lease subject to an existing incumbrance, and which he is bound to see satisfied, this Court would lose sight of its highest duty, if it for one moment permitted such a person, by committing a breach of contract, to divest himself of the estate and acquire a new interest discharged of the old incumbrance.—S. C.

Where lease subject to an incumbrance which lessee bound to see satisfied, Court will not permit him by breach of contract to divest himself of the estate and acquire a new interest discharged of the incumbrances. Reversion expectant on lease for lives—Interest on purchase money.

Lord Chancellor.—The subject matter of the sale in this case was a reversion expectant on a lease for lives. In such cases, generally speaking, a purchaser must pay for the wearing out of the lives; for as the lives wear out, the reversion becomes more valuable, approaching nearer to the possession, and, in that view, the time becomes equivalent to receipt of rents and profits. But this purchaser comes to the Court, and says, "Let me take the reversion in its present state, after the wear and tear of the lives, at the price agreed upon at the time of the original contract;" in other words, "Give me that which is more valuable than what originally I bought, and charge me nothing for the increased value." I cannot allow both. The wearing out of the lives, as I before said, is equivalent to the receipt of rents.

AGREEMENT. Interest should be given from the very hour when the report found that the vendor could have conveyed. The purchaser takes the estate with the benefit of the wearing of the lives.—*Enraght v. Fitzgerald*, 2 Dru. & War. 43; S. C. 1 Con. & Law. 181.

Inquiry at what time a good title could be made.

In England the rule is (and I shall certainly adopt it here), in every case of specific performance, to add, as of course, to the reference as to whether a good title can be made, a direction—“If so, at the request of either party, let the Master inquire, and report at what time a good title was shown.” Formerly this reference was never made until the report came back for further directions, and then the case was sent to the Master for the purpose of this inquiry. The present practice was established by Sir John Leach with the approbation of the bar.—S. C.

Partial execution.

Lord Chancellor.—The Court acts only, when it can perform the very thing, in the terms specifically agreed upon; but when we come to the execution of a contract, depending upon many particulars and upon uncertain events, the Court must see whether it can be specifically executed; nothing can be left to depend upon chance: the Court must itself execute the whole contract. By the rules of the Court, if I am called upon to execute the contract, I must myself specifically execute every portion of it; I cannot give a partial execution of the contract.—*Gervais v. Edwards*, 2 Dru. & War, 80; S. C. 1 Con. & Law. 242; 4 Ir. Eq. Rep. 555.

Some acts performed subsequently.

There are cases where some of the acts to be done, consequent on the specific execution of the contract, may be performed subsequently.—S. C.

Contract for sale of timber.

A contract for sale of timber can be specifically executed, although the timber is to be cut down at a future time, or at intervals, and the money to be paid by instalments. It is a certain contract, and the manner of dealing with the thing sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Part of the contract is at once capable of a specific execution.—S. C.*

Covenant for something to be done hereafter.

If a man agree to do a certain act; for example, to dispose of an estate, with a covenant for something to be done hereafter, the Court can carry such a contract into specific execution. The decree would give all that was presently contracted for, the

* *Arkwright v. Stoveld*, 1 C. P. Coop. 499. Bill for specific performance of agreement to buy timber.

immediate transfer of the estate itself, and compel the party to enter into the covenant to do the particular thing.—S. C. AGREEMENT.

One of the clauses in an agreement, a specific performance of which was sought, was, that if thereafter when works not then commenced were completed damage should arise to the land of one party, arbitrators should ascertain the damage, and the other party should convey land equivalent in value to such damage. The Lord Chancellor said, that the authorities upon the right of the Court to compel the execution of a contract, where the price is to be fixed by arbitration, show how many difficulties the Court would have to struggle with in such a case as the one before him.—S. C. Arbitrators to ascertain damage.

Contract for sale of annuity; the seller resident in England, the purchaser resident in Ireland. Question, whether the contract was an English or Irish contract.—Case to a Court of Law directed.—*Ferguson v. Lomax*, 2 Dru. & War. 120. Question whether a contract was an English or an Irish contract.

Bill by tenant in possession against his landlord, for specific performance of a parol agreement for a lease, alleging the continuance in possession to be a part performance. The Lord Chancellor.—I have no intention to go beyond the authorities, as they at present stand, with respect to the doctrine of part performance. The rule is perfectly clear, that if a man is in possession of land as tenant, a mere parol agreement cannot have any operation in law; for the Statute of Frauds is in the way, and there is nothing but the subsisting tenancy to which this Court can refer any act which may have been done, where it is consistent with his character as tenant. His remaining in possession is a mere continuance of the character which he all along filled; and any act which may be thus referred to a title distinct from the agreement, cannot be considered as operating to take the case out of the statute. I cannot therefore refer any act of the tenant, after his possession as tenant, to a new tenancy under a parol agreement. There is no part performance to take the case out of the statute. The continuance on the part of the tenant to perform his duties as a tenant, is not a ground on which this Court could rest, as constituting an act of part performance.—*Brennan v. Bolton*, 2 Dru. & War. 349. Bill by tenant in possession against his landlord for specific performance of a parol agreement for a lease, alleging the continuance in possession to be a part-performance.

Lord Chancellor.—An agreement in consideration of compounding a prosecution for a felony is void; but an agreement to make the prosecutor of a misdemeanor, of a private nature and occasioning a private injury, a reasonable satisfaction in con- Agreement to make a prosecutor satisfaction in consideration of proceedings stayed.

AGREEMENT. sideration of proceedings stayed, may not be illegal. There are cases that show, that although an offence indictable as a misdemeanor may have been committed, and a prosecution may have been actually commenced; yet, if the prosecutor has himself a personal interest in the matter, and it affects his property, he may consent to waive the prosecution. For instance, a man has, in some sort, a property in his own person, and if an assault and battery (which is an act of a criminal character) has been committed upon him, he may decline to institute a public prosecution, and enter into a compromise. So, if a man has a right to property which has been invaded, and the act of invasion has amounted to a misdemeanor in the view of the law, as if an exclusive right to a fishery has been interrupted; and so, in every such case in which a man has a private personal interest, he has a right, if he pleases, to forbear from a prosecution; he may disregard the interests of the community, and accept of compensation for the injury inflicted on himself.—*Westby v. Westby*, 2 Dru. & War. 502; S. C. 1 Con. & Law. 537; 4 Ir. Eq. Rep. 585.*

Purchase of life interest under decree of Court, and life drops before Master's report confirmed.

The Lord Chancellor.—The point which I am called upon to decide is, whether a purchaser of a life interest, under the decree of the Court, can be released from his purchase where the life drops before the Master's report could have been confirmed absolute.—*Vesey v. Elwood*, 3 Dru. & War. 74.

Lord Chancellor.—It is settled, but not without much previous conflict of opinion, that a purchaser in common cases is the owner of the estate from the time of the contract, and from that period must bear any loss, and is entitled to any benefit; and this applies as well to damage to the property, e. g. by fire, as to the interest in the property; for example, the death of the life for which it was holden. So as to profit; for an accidental improvement of the property would belong to the purchaser, as well as an additional interest by the dropping of a life, where the reversion was the subject of the sale.—S. C.

Where the sale is by the Court there is this anomaly, that the purchaser is not sure that he will remain the purchaser, although he has bought the property, until the report is confirmed absolutely; because, until then, the biddings may be opened. But,

* A reference to the ensuing case may be convenient for the practitioner:—*Dewall v. Elliott*, 1 C. P. Coop. 490. Bill for performance of an agreement, entered into by defendant under threat to prosecute his sons for felony, dismissed.

if the sale be not disturbed, the purchaser is as much the purchaser of the estate from the time of the purchase in the Master's office, as a purchaser out of Court is from the date of the contract. The Court has full power over the sales under its authority; deals with the question of interest and rents, and the payment of purchase-money, upon arbitrary principles, although now the rule is a fixed one. But that does not affect the operation of the sale in transferring the property in equity to a purchaser. He may sell or devise the property, and it will descend just as if he made the purchase from an individual. The right to open the biddings, therefore, does not affect the sale, or the purchaser's right under it, unless it be exercised. The Court may disturb the purchaser, and he buys subject to that risk; but he has no option. He must complete his purchase, unless the biddings are opened, and has no corresponding right to be relieved from the purchase. Upon the whole, as the purchaser bought an uncertain interest, he must abide by the loss from the dropping of the life.—S. C.

Lord Chancellor.—It is clear, and cannot be disputed, that a contract may be made out by a correspondence. From several letters between the parties there may be extracted what will amount to an agreement; and an agreement so constituted will be carried into effect in the same manner as if it were regularly prepared in the form of articles.—*Saunders v. Cramer*, 3 Dru. & War. 87; S. C. 5 Ir. Eq. Rep. 12.

It was argued, that if a contract was held valid, its effect would be to revoke pro tanto the will of the person entering into it, contrary to the provisions of the late Statute of Wills, 7 Will. 4 & 1 Vict. c. 26, s. 20. The Lord Chancellor.—As to the new Statute of Wills, it has nothing whatsoever to do with the case; the contract is just as effectual now, as it would have been before the statute. What effect the contract has upon the will, whether it renders the devisee a trustee, or whether he takes as devisee, subject to the contract, is perhaps open to some doubt [see *Treatise on Vend. & Pur.* ed. 10th, vol. i. p. 301]; and I do not wish to be understood as expressing any opinion upon it; for that is not the question before me. If the contract is a binding one, it can be enforced against any party in whom is vested the legal and beneficial interest in the property.—S. C.

AGREEMENT.

Correspondence—Letters.

Statute of Wills.

AGREEMENT.

Voluntary limitations in marriage settlement.—Subsequent articles for value.

Can the Court as against a legal estate, vested in parties deriving title under voluntary limitations in a marriage settlement, give effect to subsequent articles in favour of a purchaser for valuable consideration?—*Stackpoole v. Stackpoole*, 4 Dru. & War. 320; S. C. 2 Con. & Law. 489.*

Dower.

Lord Chancellor.—If a man before marriage enter into a contract for the sale of his fee simple estate, his subsequent marriage would not, in equity, be held to create any right of dower (I am now speaking in reference to the old law); the husband is a trustee for the purchaser, and the Court would not allow the wife to assert her right of dower. This opinion I have always entertained, and am prepared to act upon it judicially.—*Lloyd v. Lloyd*, 4 Dru. & War. 354; S. C. 2 Con. & Law. 592.

Bill to rectify a mistake.

Two fields are included in a lease by mistake. Bill to rectify this mistake.—The Lord Chancellor said he agreed with the proposition that there must be a mistake on both sides; a mistake on one side may be a ground for rescinding a contract, but it is not a ground for taking from a man part of a property demised to him. It was evident in the case before him that the mistake was on both sides.—*Mortimer v. Shortall*, 1 Con. & Law. 417; S. C. 2 Dru. & War. 363.

Parcels.

Lord Chancellor.—Explanation as to the parcels is always open to parol evidence within the Statute of Frauds.—*Greene v. Cramer*, 2 Con. & Law, 54.

Correspondence—Letters.

It has been held not necessary that a contract should be contained in one paper; it may be made out by a correspondence. A contract may be made out by several letters.—S. C.

Parol evidence of adverse possession.

Question whether the Court will compel a purchaser to take a title, the validity of which depends on parol evidence of adverse possession.—*Scott v. Nixon*, 2 Con. & Law. 185; S. C. 3 Dru. & War. 388; 6 Ir. Eq. Rep. 8.

See a subsequent page "Vendor and Purchaser."

Penalty for securing per-

The Lord Chancellor said—The general rule of equity is

* See the Author's Treatise "On Limitations and Provisions in Marriage Settlements in Favour of Collaterals," pp. 90—92. Effect will be given to articles for valuable consideration against the legal estate vested in persons claiming under voluntary limitations to collaterals in a prior settlement.

this:—If a man agrees to settle his estate in a particular manner, and gives a bond for the performance of the agreement, he cannot forfeit the bond and get rid of the agreement, although the estate be worth more than the amount of the bond; and in the same way, if the bond is to secure his not doing an act, he cannot, by forfeiting it, enable himself to do the act.—*French v. Macale*, 4 Ir. Eq. Rep. 573; S. C. 2 Dru. & War. 269; and 1 Con. & Law. 459.

AGREEMENT.
—Performance of act.—Penalty if an act is not done.

If there be a proviso in a contract for sale, that either party is to pay a particular sum of money in case he do not complete it, there may be a specific performance of the contract notwithstanding. Therefore, where a party agrees to do an act, and binds himself if he do not, to pay a sum of money, he cannot elect to pay that sum instead of doing the act which he had agreed to do. In the same way, if a man covenants not to do an act, or if he do, to pay a particular sum of money, it would seem to follow that he cannot elect to break his agreement and pay the penalty.—S. C.

Proviso in contract that either party is to pay a sum of money in case he does not complete it.

The point to be ascertained in all such cases is, whether the agreement was that the party should be restrained from doing the act although a penalty was reserved in case he did it, or whether by the true construction of the contract, the meaning was that he should have a right to do the act on payment of the stipulated sum. Because nobody disputes that a landlord may say to his tenant—"I let you my land at a certain rent, dealing with it in a particular manner, but pay so much additional rent and you shall have such and such additional privileges." There is no difficulty in acting on it if that be the contract of the parties; but the thing is to ascertain what is the real construction of the contract that they have entered into. If the agreement is, that the party is to have a right to do the act upon payment of the penalty, then if he do the act, the full penalty must be paid.—S. C.

Point to be ascertained in all such cases.

If a man enter into a covenant of this nature for payment of a sum of money if he do a particular act, he cannot protect himself from a discovery if he do the act, under the allegation that that discovery will subject him to a forfeiture. Because after having covenanted to pay money for doing the act, he cannot be heard to say that it is a penalty in order to protect himself from discovering whether he has done the act; if he choose to do the act he must pay the stipulated sum.—S. C.

A man who enters into covenant of this nature cannot protect himself from discovery under allegation that it will subject him to forfeiture.

AGREEMENT. I think that in general the cases on the subject are easily reconcilable, although all of them cannot be maintained. The question in every case is what is the true agreement of the parties? It may be difficult to ascertain the intention of parties, but there is no difficulty in the general rule of equity upon the subject.—S. C.

Contract between landlord and tenant.

In a case of a contract between landlord and tenant, unless the tenant can make out that he was to be at liberty to do what he pleased with the land, he cannot take advantage of the mode in which the contract is framed, and entitle himself to do the act upon payment of the penalty. I consider it entirely a question of construction. If the construction be that the tenant is to be at liberty to do the act upon payment of the penalty, the Court cannot interfere, because the Court cannot act against the contract of the parties. But where it appears by the terms of the instrument that the tenant was not to be at liberty to do the act, but that if he did it he would pay a penalty, the Court has perfect power to prevent him from doing the act which he contracted not to do.—S. C.*

Parol evidence.

Lord Chancellor.—Parol evidence is offered to show what was the intention of the parties in entering into the agreement. Upon that subject the rule is so well settled as to render it absurd to discuss it. The question is, whether I can receive parol evidence of the intentions of the parties to control and explain a written agreement. The rule is perfectly well settled, that when a written agreement has been entered into, although the clearest evidence may be offered to show that it was also agreed that something—that payment of taxes (for instance)—was to make another term in the agreement, the Court cannot receive parol evidence in order to add that term to the written agreement.—*Davis v. Fitton*, 4 Ir. Ep. Rep. 612; S. C. 2 Dru. & War. 225.

The cases draw the precise distinction that you may, on a bill filed for the specific performance of a written agreement, adduce parol evidence on the part of a defendant resisting that performance, to show that the agreement has been departed from,† but

* In connection with the subject of the foregoing case the student may consult the passages, 1 C. P. Coop. 220—2, to which the following marginal notes are prefixed:—Issues of quantum damnificatus.—Obligees in common money bonds formerly came into equity to be relieved against the penalty.—Consequence of issues quantum damnificatus.

† See *Fife v. Clayton*, 1 Rep. temp. Cott. 352. Lord Eldon said, if the

that you cannot use such evidence on the part of the plaintiff ^{Agreement.} who is seeking such performance.—S. C.*

Observe what it is that is sought to be done in the present case. It is said the contract which has been executed is contrary to the agreement of the parties, and the Court is called upon to make it conform to the agreement. But how is it made out that the instrument which has been executed is not conformable to the agreement? By parol evidence, which, if the parties were coming here to have that agreement executed, the Court would be bound to reject. If, therefore, I should be obliged to reject this evidence in a suit for the specific performance of the agreement, how could I reform the instrument that has been executed by that very parol evidence, which, in a suit to carry the agreement into execution, I must undoubtedly have rejected?—S. C.

It is said that if there had been no written agreement entered into the Court might correct a mistake in the lease by parol evidence of what was the intention of the parties. There is no doubt it might, but why? Because there is no rule against it; because where no written contract has been entered into, there is nothing to contradict the parol evidence, and the entire agreement being in parol, I should inquire what it really was. But if a written agreement has been entered into the parties must stand or fall by that.—S. C.

auctioneer represented that the purchaser would be entitled not only to the premises put up to sale as described in the printed particulars, but also to an allotment to be made in respect thereof, the purchaser being defendant, and the vendor plaintiff seeking to compel the purchaser to take a conveyance without the allotment, the purchaser might go into parol evidence of what the auctioneer had said, in order to resist the vendor's demand.

* In the case mentioned in the preceding note Lord Eldon said, that parol evidence such as that into which the plaintiff [the purchaser] had gone, was receivable only where the purchaser was a defendant, and the vendor, as plaintiff, sought to enforce the agreement against him. Where the purchaser was plaintiff, the question was only one of construction.

See *Squire v. Campbell*, 2 Rep. temp. Cott. 112. Familiar doctrine, that although, to resist a specific performance, a defendant may show by parol that the written document does not represent the contract between the parties, yet a plaintiff cannot have a decree for a specific performance of a written contract with a variation, upon parol evidence.

See also *Howard v. Wright*, 2 Rep. temp. Cott. 114. As a plaintiff seeking specific performance, you can give no parol evidence of a term, which either is not contained in, or which varies from, the written contract.

AGREEMENT.

I do not think, that because when a contract has been carried into execution contrary to the real intention of the parties, and there has been no antecedent written agreement, the Court will correct the instrument that has been executed, by parol evidence, that that is any reason for receiving parol evidence to contradict a written agreement, when it is perfectly clear that if you were seeking to enforce that written agreement with a parol variation you could not succeed.—S. C.

Where a party sues upon a contract which has been executed, and where he is coming to carry into execution a contract still in fieri.

Lord Chancellor.—It is a mistake to import into cases where a party sues upon the footing of a contract which has been executed, the rule which prevails in those cases where he is coming to carry into execution a contract still in fieri. In the cases where he is coming to execute a contract, which never has been perfected, the other party may show that the contract was not conformable to the real intentions of the parties;* but where the contract has been fully executed the Court must act upon it as it finds it. You may file a bill to correct it if it differs from the real contract between the parties; but, while it is uncorrected, it is no defence to say that it is not conformable to the contract. It must be acted upon according to the instrument executed by the parties, as long as that remains uncorrected.—*Law v. Warren*, 6 Ir. Eq. Rep. 299.

Plaintiff having agreed to grant a lease of two stores, an agreement is drawn up in terms extending to only one of the stores; and the plaintiff availing himself of the mistake, files a bill insisting on the legal construction.

Lord Chancellor.—The plaintiff having agreed to grant for 30l. a lease of two stores, an agreement is drawn up in terms extending to only one of the stores, and the plaintiff, availing himself of the mistake, files a bill insisting on the legal construction, and asks the Court to give effect to that which was not the real agreement; I consider that an attempt to commit a fraud. It is true there is nothing clearer than that parol evidence of conversations cannot be read to give a construction to a written agreement, because the treaty is put an end to by the contract itself; and, therefore, unless there be some fraud or mistake, conversations previous to the agreement go for nothing. The Statute of Frauds would be

* See *Neap v. Abbott*, 2 Rep. temp. Cott. 382. In a suit for specific performance, the nature of a case being such as, even in the absence of parol evidence, to impress the mind of the Court with the belief that there has been surprise or mistake, the plaintiff should be left to his legal remedy.

See also *Howard v. Wright*, 2 Rep. temp. Cott. 114. Specific performance being discretionary, parol evidence is receivable on the part of a defendant, not only of fraud and misrepresentation, with reference to a written contract, but also of error and surprise.

of no avail if the previous conversations were admissible after the contract was actually concluded. But this does not exclude conversations if the case be one of misrepresentation, fraud or surprise.—*Molloy v. Egan*, 7 Ir. Eq. Rep. 593. AGREEMENT.

The evidence shows the real nature of the contract, and the question is, whether I can give the aid of this Court to a plaintiff making such a case as this? The plaintiff now says, "I am content to admit that the real contract was not as I stated it, but as it is proved, viz.—a contract for both stores, and I now waive so much of my case as excludes one of the stores." I never will execute a contract for a plaintiff one way, when, with his eyes open, he insists in his bill on a different construction against good faith. If he attempts to perpetrate a fraud and fails, I shall take care that he fails altogether, and does not obtain the aid of the Court at all. A Court of Equity is not to let parties speculate whether they can commit a fraud, and then, if they fail, seek what they are really entitled to. I am perfectly justified in dismissing the bill on that ground, although I should have had no difficulty in giving the plaintiff a decree according to the real meaning of the contract, if he had asked for it directly, properly and fairly. I think time is not of the essence of this contract, and, therefore, he would have been entitled to relief if he had asked what was fair and according to the truth.—S. C.*

Evidence showing the real nature of the contract, the plaintiff said he was content to admit that the real contract was not as he stated it, but a contract for both stores, and he waived as much of his case as excluded one of his stores.

Bill to have the benefit of post obit mortgages. Lord Chancellor.—No cross-bill has been filed to impeach these securities; but evidence has been given by the defendant, which I must at present consider to be *prima facie* evidence of the fact, that the true value was not given for these post obit securities; and it is now insisted, on behalf of the defendant, that I am at liberty to deal with this case without a cross-bill, and that I may withhold from the plaintiff the decree to account which he asks, and frame a decree to suit the circumstances of the case. If a cross-bill had been filed, the question which has been discussed—whether this

Executed contract—Cross-bill.

* See *Benson v. Glastonbury Canal Company*, 1 Rep. temp. Cott. 350. According to the bill a parcel of land was for sale, and possession had been given of five acres—according to the answer—of three acres only. The Lord Chancellor asked if the cause should be brought to a hearing, and the plaintiff should fail to prove that the agreement was as laid by the bill, must not the consequence be that the bill would be dismissed?

See an extract from a judgment of Sir John Strange, *ibid.* 351.

AGREEMENT. transaction could be maintained in a Court of Equity—would have properly come before me. The general rule of the Court requires a cross-bill to be filed in a case like the present. This is a contract, whether it be good or bad, which is executed in the sense in which that word is used in this Court; and if executed, then it is the clear rule of the Court, that the party desirous of being relieved from a contract executed, must file a cross-bill for the purpose. It would lead to great inconvenience if it were otherwise; and I am not inclined to relax the practice in that respect.—*Richards v. Bayly*, 1 Jo. & Lat. 120.

The decree that was made was without prejudice to the defendant filing a cross-bill to impeach the transaction if he should be so advised.*

Construction
—Vendor's
interest—
Good title.

Question of construction of contract for sale of a leasehold for lives. Upon the part of the vendor it was contended that the contract was for a sale of his interest in the lease in question, whatever it might be; and that the parties, when speaking in their contract of a good title being made out, only meant that it should be free from incumbrances, but the Lord Chancellor thought it clear upon the contract that the vendor was bound to make out a good title.—*Anderson v. Higgins*, 1 Jo. & Lat. 718.

Evidence—
Cestui que
vies.

Evidence to show which of the cestui que vies were in existence at the time of the contract must form part of such a title.—S. C.

Lease.

Question whether an instrument was a lease or an agreement for a lease.—*Clarke v. Moore*, 1 Jo. & Lat. 723; S. C. 7 Ir. Eq. Rep. 515.

Laches.

Lord Chancellor.—Laches has nothing to do with such a case as this. It is new to me to hear it argued, that because a party has neglected for a long time to call for the execution of a contract for a lease, he being in the enjoyment of the benefits given to him by the contract, therefore he is not at liberty to enforce it at any time before the term expires.—S. C.

Contract for
a specific
purpose
which fails.

There are cases in which a man having entered into a contract for a specific purpose, which afterwards failed, has not been, in this Court, compelled to accept the lands; but the other party has been left to his remedy at law.—S. C.

Agreement
for a lease,
and after-
wards an
agreement for
abatement of
the rent.

There being an agreement for a lease, and afterwards an agreement for an abatement of the rent, it has been argued that there was an abandonment of the contract. I did not under-

* See also *Nash v. Flynn*, 1 Jo. & Lat. 162.

stand that argument at first; it is rather refined. I should be AGREEMENT. sorry to hold that because a landlord abates the rent for a time, or permanently, he therefore abandons the whole contract. It is one thing for a landlord to say to his tenant, "I will take a lesser rent, you still continuing to hold according to the terms on which you now hold;" and another thing to say, "I will create a completely new tenancy in lieu of the former." I should do a most mischievous thing were I to hold that a mere abatement of rent, which occurs every day, would altogether put an end to the existing contract, and create a new tenancy from year to year. The abatement of the rent was rather a confirmation of the existing tenancy, with a relaxation of one of the terms of it. It was then said that the effect of the new agreement was to create a new tenancy, in which the existing tenancy would merge: a sort of implied surrender. There is no authority in law for such a position. The party, no doubt, was, at law, tenant from year to year; but in the view of this Court he was a tenant for the whole term, according to his agreement. Another way in which the matter was put was this: that there was a change or substitution of the one agreement for the other; but I see no grounds for adopting that opinion.—S. C.

Agreement to grant a lease for thirty-one years by tenant for life with power to lease at the best rent. Cases on the question whether the best rent has been got or not. No authority standing in the way of a decree for a partial execution of the agreement against the tenant for life for the term of his life. The Court however held that in this case the contract was a valid contract, binding upon the inheritance, and that it must be specifically performed by the grant of a lease for the whole term mentioned in it.—*Dyas v. Cruise*, 2 Jo. & Lat. 460; S. C. 8 Ir. Eq. Rep. 407. Tenant for life, with power to lease at best rent.

Bill for the execution of a settlement in pursuance of inaccurate marriage articles. Declarations of the Court putting construction upon the same, and reference to the Master to approve of a settlement having regard to such declarations.—*Roche v. Roche*, 2 Jo. & Lat. 561. Inaccurate marriage articles.

Lord Chancellor.—The mere continuance in possession by a tenant from year to year, who has contracted by parol for a lease, will not confer a title which can be enforced in this Court. Continuance in possession by tenant who has contracted by parol for a lease.—*Donohue v. Conrahy*, 2 Jo. & Lat. 688; S. C. 8 Ir. Eq. Rep. 679.

Bill by tenant against landlord for specific performance of Tenant and landlord.

AGREEMENT. agreement to execute a lease. Lord Chancellor.—In England the solicitor for the lessor always prepares the lease and tenders it for execution, though the lessee has to pay for it. There is nothing in the law of Ireland which prevents a lessor in a case where there is no stipulation in the contract as to the party to prepare the lease, from himself preparing and tendering it for execution. If he did so, and it were rejected, he would have a good defence to a bill by the tenant for a specific performance. The lessor has the remedy in his own hands, if he believes that his tenant is delaying the performance of his contract from an improper motive.—*Burke v. Smyth*, 3 Jo. & Lat. 198, 199; S. C. 9 Ir. Eq. Rep. 135.

The lessor was as much to blame as the tenant in not tendering the lease, and therefore I do not think that is a ground upon which I ought to refuse a decree. The tenant too is much to blame. He has not shown diligence in asserting his rights.—S. C.

Stipulation in an agreement that something prohibited by act of parliament should rest in understanding.

Lord Chancellor.—If parties enter into an agreement which is legal to a certain extent, to which extent they mean that the agreement should be executed by an actual lease, and stipulate that something further which is not *malum in se*, but merely prohibited by an act of parliament, should rest in understanding, I am not prepared to say that in such a case I should not make a decree for the performance of the agreement, as far as it was capable of legal execution. The effect of such a decree would be simply to do what the parties intended. They intended that what was legal should be inserted in the lease, and what was not should rest in understanding. It could not be said, in such a case, that the Court was evading, or assisting in the evasion of, the act of parliament. It is a matter of imperfect obligation to which the Court gives no effect.—*Carolan v. Brabazon*, 3 Jo. & Lat. 200; S. C. 9 Ir. Eq. Rep. 224.

Waiver.

Lord Chancellor.—As to waiver; if one party waive a contract, it implies that the other party was previously bound by the contract; and this Court requires as clear evidence of the waiver as of the existence of the contract itself; and will not act upon less.—S. C.

Irish Registry Act.—Conduct of parties.

Lord Chancellor.—Admitting the doctrine as to the operation of the registry act, (6 Anne, cap. 2, Ir.) that although the act does not convert an equitable into a legal estate, yet it so impresses the title with the liability to give effect to the equitable estate, that the person who obtains the legal estate is bound to

support the equitable title and to clothe it with the legal ^{Agreement.} estate—there is still nothing to prevent the Court from looking into the conduct of a party filing a bill for specific performance, in order to see whether he is entitled to the relief prayed. —*Drew v. Lord Norbury*, 3 Jo. & Lat. 267; S. C. 9 Ir. Eq. Rep. 171.

The Lord Chancellor thought the laches so gross that the ^{Laches.} plaintiff had wholly disentitled himself to relief.—S. C.

A contract for a lease was as follows: From the love and ^{Mention of love and affection as a consideration.} affection I have for you as my first cousin, I now promise and engage to you, your heirs or assigns, during my natural life, in reversion, the farm of C. as now in your actual possession, at 11. 2s. 9d. per acre, as now paid and payable by you.—*Moore v. Crofton*, 3 Jo. & Lat. 438; S. C. 9 Ir. Eq. Rep. 344.

Lord Chancellor.—Where there is a settlement between strangers actually executed, the Court does not weigh in very nice scales the adequacy of the consideration. This, it is true, is a contract resting in fieri, and therefore there is a difference; but no person can dispute that the mere mention of love and affection as a consideration cannot remove the other valuable consideration, viz. the continuance of the same rent which was reserved by the lease previously granted. If this had been an agreement with a mere stranger it would have been binding, unless it were shown that there was such an inadequacy in the amount of consideration as was demonstrative of fraud.—S. C.

I do not admit that a man may not enter into a contract with ^{Amount of consideration reduced by reason of the relationship of the parties.} a relation, and give him better terms than he would to a mere stranger. This Court is not to shut its eyes to the fact that a near relationship existed between the parties; and although it will not execute a merely voluntary contract, yet it will execute one for valuable consideration, and will not weigh in very nice scales the amount of the consideration, where it has been reduced fairly by reason of the relationship of the parties.—S. C.

It has been said, that this was an agreement twenty-one years ^{Objection that agreement twenty-one years old.} old; but that objection cannot be supported, for it is a contract for a lease in reversion, and the right to the possession under the agreement did not accrue until the death of the last cestui que vie in the existing lease.—S. C.

A decision of mine has been referred to [*Donohue v. Conrahy*, Contract to

AGREEMENT. 2 Jo. & Lat. 688,*] in which I followed a case in Vesey [*Wills v. Stradling*, 3 Ves. 378], that a mere continuance in possession as tenant is not a part performance of a contract to grant a lease. I think that is right.—S. C.

grant a lease.
—Continuance in possession as tenant not part-performance.

Abandonment.

Letter of licence.

Unless a party has by his conduct forfeited his right, which is not the case here, abandonment of a contract, according to the law of this Court, is a contract in itself.—S. C.

Question, whether a certain agreement not under seal was, in the circumstances under which it was signed by a party, a concluded agreement, absolute and binding upon him, and operated as a letter of licence, so as to prevent him becoming the petitioning creditor in the bankruptcy. Lord Chancellor.—Suppose one or two of a body of creditors to sign such a document, and all the others to refuse to execute it, and that nothing was said about conditions when the parties signed it, might not a jury come to the conclusion that it was not intended that the document should operate unless the body of the creditors signed it? I think it is a legitimate question to ask a jury, whether the instrument was not executed under circumstances which, in the event, render it not binding upon the parties signing it; viz. that the instrument was in a course of signature; that that course was not completed, and that the instrument is not that which the parties intended.—*Re Semple*, 3 Jo. & Lat. 488.

I cannot admit that it is not a question to be considered, whether or not a signature of a creditor to a letter of licence, which it was contemplated would be signed, not perhaps by all, but by an influential and overpowering body of the creditors, was intended to be binding on an individual creditor having consented, unless in event it became binding on the general body of the creditors.—S. C.

Covenant in lease that lessor might search for mines and hold 200 or 300 acres if mines found.

Covenant in a lease, that it should be lawful for the lessor, at all times during the term, to enter into the demised premises, and to dig and search for mines, and further to hold two or three hundred acres of the said premises, at the election of the lessor, most contiguous to the mines, in case any should be found, the lessor making an abatement for such acres out of the rent. Sublease made, house built, mines discovered, lessor selects land to be taken. The house was built on part of such land. Specific performance decreed.—*Croker v. Orpen*, 3 Jo. & Lat. 589; S. C. 9 Ir. Eq. Rep. 563.

* See before, page 95.

Lord Chancellor.—As to the question upon the equity, of ^{AGREEMENT.} course this covenant does not admit of two constructions, one at law and the other in equity; but I agree that, if an unconscionable use were made of it, I might leave the party to his remedy at law. It requires, however, a very strong case to justify the Court in refusing to grant the relief sought in this case; for if there be one case in which specific performance ought to be decreed more than in another, it is where a party agrees to surrender a given estate to his landlord; and if the peculiar remedy for such a case is a specific performance, how much stronger is the case where the landlord is entitled to have both the mines and the lands. The Court gives him the mines specifically, and he enters on them; but though the Court alone has the power of giving him the land, yet it is asked to withhold from him that which, according to the contract, was inseparable from the mines. I think that that objection cannot be maintained. I am not aware of any case which would authorize me to refuse a specific performance in this case. I felt the hardship upon one of the defendants, that the house he had built upon the lands should be taken from him; and if I found that the plaintiff was abusing his right for the purpose of obtaining possession of this house, upon which I doubt not he has cast a wishful eye, I would not aid him in attaining his object. But the landlord is himself bound by the clause in the lease; he must take the lands which are most contiguous to the mines; and the persons claiming under the sub-lease must in law be considered to have been aware of the right of resumption reserved by the original lease. But the plaintiff has relieved me from the necessity of considering that matter; for he has fairly and properly submitted to pay the value of the dwelling-house, according to the value of two persons, one to be named by each party.—S. C.

Omission to stamp an agreement at the time of its execution, Stamp, and provision that, if it should become necessary to stamp it, one of the parties should pay the expense. The Court will not carry into execution such an evasion of the Stamp Act —*Abbott v. Stratten*, 3 Jo. & Lat. 603; S. C. 9 Ir. Eq. Rep. 233.

Borrower gave lender a letter of attorney, authorizing him to receive the borrower's rents, and agreed not to revoke it until the money borrowed should be repaid.—S. C. ^{Letter of attorney.}

Lord Chancellor.—I have repeatedly acted in this Court upon the rule, that an agreement binding property for valuable con- ^{Equitable agreement or mortgage.—Subsequent judgment.}

AGREEMENT. sideration, though equitable only, will take precedence over a subsequent judgment, whatever may be the consideration for it, and whether obtained in invitum or by confession. This is not denied to be so in the case of a purchase, and an equitable mortgage is, pro tanto, a purchase in the strict sense of the term. The agreement (for that is really the question) is in this Court the mortgage: it is the pledge. The mere legal operation of the instrument goes for nothing; the agreement itself is, in the view of a Court of Equity, equivalent to the execution of a mortgage.*—S. C.

Defendant may insist on parol variation from which he would be excluded as plaintiff.

Lord Chancellor.—The rule of the Court is, that if a man files a bill to enforce a specific performance of an agreement for a lease, although being the lessor, if he had filed a bill, he could not when plaintiff introduce terms agreed on by parol, yet when defendant he may set up as a defence what the real agreement by parol was, and may insist on a parol variation from which he would be excluded as a plaintiff.—*Warren v. Thunder*, 9 Ir. Eq. Rep. 371.

[To be continued.]

Joddrell
MSS.
Court of
Chancery,
June, 1743.

Tenant for life of leasehold house, also administratrix with will annexed, obtains a reversionary lease. Decree that the same was in equity to be considered as part of testator's estate.

General rule that a trustee cannot act for his

More v. Howell, Ridler and others.

This bill was brought by the plaintiffs for their distributive shares of the personal estate of John Barns, deceased, against defendants, who were the executors of Jane Barns, his widow. John Barns was, at the time of his death, possessed of a leasehold house in Pall Mall, held of the Crown for two terms of years, and also of another lease from the Crown of a moiety of six houses in Stonecutter's Court. And by his will he gave all these houses to his wife for life, and made no disposition of them after her decease. In 1719 John Barns died, and in 1730 Jane died. But some short time before her death, there being but eleven years to come in the lease of the

Equitable mortgage. Subsequent judgments.

* Lord Chancellor.—Does an equitable mortgage take precedence or not of the subsequent judgments, however bonâ fide they may be, and supposing them to have been obtained for valuable consideration, and without notice of the equitable mortgage? I can only say that, ever since I have been in the profession, I have considered that a settled point; and down to the time a question was raised upon it in *Whitworth v. Gaugain*, reported in Craig and Phillips, 330, I never entertained a doubt upon the subject. It would be pedantry to go through the cases on this subject, after the full review of them, in the case to which I have referred, when it was before Vice-Chancellor Wigram, 3 Hare, 416. I fully agree in his conclusion.—S. C.

houses in Stonecutter's Court, she, together with the person entitled to the other moiety, assigned the lease to trustees, and, for a fine paid, obtained a reversionary lease from the Crown for thirty-five years, to commence from the determination of the former lease. This lease was granted to the trustees, who declared the trust as to a moiety for Mrs. Jane Barns, her executors and administrators.

own benefit, but whatever he does that is beneficial for the trust, he shall be deemed in equity to do as a trustee. Cases of compounding debts.

One of the questions in this cause was, whether the reversionary lease was in equity to be considered as a part of John Barns's personal estate, and, consequently, after the death of Jane Barns distributable amongst the plaintiffs, as next of kin.

Baron Clarke (who tried this cause in the absence of the Chancellor), was of opinion that this must be considered as a part of the personal estate of John Barns. For, as Jane was administratrix with the will annexed of her husband, and entitled to these leases for her life only, she ought to be considered as a trustee as to the remaining part of the interest in them. And it is a general rule that a trustee cannot act for his own benefit, but whatever he does that is beneficial for the trust he shall be deemed in equity to do as a trustee, and the Court must, in these instances, go on some general rule, and there is no difference between an executor or administrator in trust and any other trustee. For in cases of compounding debts they are so considered, though if any other person buys in a debt for less than is due, he will have the advantage of such a bargain. The case of *Saunderson v. Sellick*, by Lord Talbot, is a case directly in point, and though it has been said that this rule of considering the reversionary as a continuation of the old interest, has only been extended to leases from collegiate and ecclesiastical persons where the lessees have some kind of right to a renewal, yet that case [*Saunderson v. Sellick*] goes further, for there were there reversionary leases granted by private persons to the husband of the administratrix. Decreed accordingly.

POLICY OF THE COURT WITH REFERENCE TO LANDS IN MORTGAGE.

LORD LANGDALE, A.D., 1837.—The expediency of the policy upon which the Court acts with reference to lands in mortgage seems very doubtful. Our decrees of foreclosure, orders for enlarging the period fixed for making the foreclosure absolute, orders for opening the foreclosure often obtained on very

Policy of the Court with reference to lands in mortgage.

trifling and insufficient grounds—all these show that it is the policy of the Court to prevent the alienation of land. But can it be advantageous to the community that lands should continue in the possession of families having so encumbered them as to preclude all possibility of their laying out money in improvements? When mortgagors are unable (a reasonable time being allowed for the purpose) to fulfil their engagements, might not some such summary method as is described by you as prevailing in a neighbouring country, be beneficially introduced here?—
Notes of Conversations of eminent Lawyers.

Remarks.
By the Improvement of the Jurisdiction of Equity Act the Court has power to direct a sale of mortgaged property instead of a foreclosure of the equity of redemption.

The Improvement of the Jurisdiction of Equity Act, 16 Vict. c. 86, contains the ensuing provision:—Sect. 48. It shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor or any person claiming under them respectively, to direct a sale of such property instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that, if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request.

V. C.
Dec. 1830.
Subpœna to
hear judgment.

Colebrook v. Randle.

Sir L. Shadwell.—Had the subpœna to hear judgment been served after, instead of before, the New Orders came into operation, and consequently been served upon the Clerk in Court, and not upon the party, my opinion would be the same.† Under the

* Lord Langdale alludes to a brief statement of the provisions respecting mortgages contained in the Laws of France, communicated to him by the editor on his return from Paris in the autumn of 1837.

† The 20th of the General Orders, April, 1828, made service of the subpœna to hear judgment on the Clerk in Court good service. Those orders took effect on the first day of Easter Term following. Not a few of the causes standing for hearing on December, 1830, had been set down under the old practice. The subpœnas to hear judgment had consequently been served upon the parties. *Colebrooke v. Randle* (see also ante, p. 9) was one of such causes. The 26th of the General Orders, May, 1845, has substituted the solicitor for the clerk in Court. Service upon a defendant's solicitor of a subpœna to hear judgment is to be deemed good service upon the party.

new practice it will be requisite to serve the subpoena to hear judgment upon the Clerk in Court in those cases in which, under the old practice, it was requisite to serve it upon the party. What are all those cases it is not necessary at the present moment to consider.

v.

Sir L. Shadwell.—The point has been brought before me not unfrequently, and I have no doubt that there are many cases in which a cause having been called on and not disposed of, but for some reason standing over, and being afterwards set down again, service of new subpoenas to hear judgment is wholly unnecessary.*

V. C.
Dec. 1830.
Subpoena to
hear judgment.

Clerke v. Phelps.

Sir J. Leach.—Where a cause is set down at the request of the defendant, he must serve a subpoena to hear judgment upon the plaintiff, but he need not serve a subpoena to hear judgment upon his co-defendants; that is the duty of the plaintiff, which, if he neglects, he will incur all the usual consequences of such an omission.

V. C.
Feb. 1821.
Subpoena to
hear judgment—Cause
set down at
request of de-
fendant.

Heysham v. Heysham.

Sir Lloyd Kenyon.—A great Chancellor has said that this Court, in matters that concern its wards, will hear a person as *amicus curiæ*, and will, if necessary, give extra-judicial directions.†

Rolls, 1784.
Wards of the
Court.

Westby v. Westby.

Lord Cottenham.—The Chancellor, in matters that concern the well-being of the wards of the Court, neglects no information; it signifies not what is the nature of it, nor from what

L. C.
March, 1847.
Wards of the
Court.

* For some years after the editor was called to the bar there was an impression amongst practitioners that fresh subpoenas to hear judgment were required whenever a cause was set down a second time. See the 57th proposition of the Chancery Commissioners (1826).—An old MS. Book of Practice, in the editor's possession, shows that solicitors in the early part of the last century commonly took the precaution of serving new subpoenas to hear judgment. See also *Knowles v. Spence*, Mos. 226.

† See 2 Vesey, sen. 484.

quarter it comes. The consequence is, that there are occasions on which the Chancellor will act without any direct application, either by petition or motion. He will send for the solicitor and give such directions as the information communicated may render necessary or expedient.

NEXT FRIEND DYING.

Next friend dying.

The solicitor for infant plaintiffs, where the next friend dies and a person has been found willing to undertake the office, procures an order by which such person is appointed the new next friend, and serves such order upon the Clerk in Court of the defendants.—Old MS. Notes of Practice.*

NEXT FRIEND RETIRING.

Next friend retiring.

Next friend who retires must give, if it is required, security for the costs incurred in the suit up to the time of his retiring.—Old MS. Notes of Practice.

NEW NEXT FRIEND.

New next friend.

New next friend substituted in the place of one dying, or for any reason discharged, becomes liable as regards the defendants to all the costs of the suit, both those incurred prior and those incurred subsequently to his nomination.—Old MS. Notes of Practice.

V. C.
Feb. 1824.

A solicitor presenting a petition, or giving a notice of motion on the part of an infant or married woman, and neglecting to name a prochein ami.

Dixon v. Heaton.

Sir J. Leach.—It is the duty of a solicitor to know the practice of the Court. He ought to know, that whenever an application is made to the Court on behalf of a party under disability there should be a prochein ami. Should a solicitor present a petition, or give a notice of motion on the part of an infant or a married woman, and neglect to name a prochein ami, I should consider the solicitor himself as the prochein ami, and I should have no hesitation, the proceeding failing, to order the costs to be paid by him.

PROCHEIN AMI.

Prochein ami. LORD LANGDALE, A. D. 1850.—There is no doubt that a parol

* See *Westby v. Westby*, 2 Rep. temp. Cott. 211.

authority to file a bill will do. One may imagine many cases in which it would be not only inconvenient, but highly injurious to suitors were it otherwise; but Lord Eldon laid it down, that where the authority is disputed—where there is assertion and denial—the solicitor must abide by the consequences of his having neglected to take an authority in writing. There is no description of suits in which the observance of this rule is more requisite than in those instituted in the names of plaintiffs, under the disability of infancy or coverture, by *prochein amis*. During the last fourteen years there have been cases at the Rolls Court, in some of which a demand for costs, occasioned by some unsuccessful step in the cause, has first made the *prochein ami* aware of the existence of the suit, and in others of the liability which the use of his name had thrown upon him.—Notes of Conversations of Eminent Lawyers.

By the Improvement of the Jurisdiction of Equity Act, 15 & 16 Vict. cap. 86, sect. 11.—Before the name of any person shall be used in any suit to be instituted in the said Court as next friend of any infant, married woman, or other party, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill or claim.

Remarks.
Next friend.
Provision in
Improvement
of Jurisdiction or Equity
Act.

Sayer v. Stonehouse.

Bill filed by plaintiff, as *prochein ami* of defendant's wife, who when the bill was filed was an infant, to carry the articles made on their marriage into execution for her benefit. The defendant's wife was now come of age, and being present in Court, it was upon her desire moved, that the bill might be dismissed, she declaring her dissent to it.

Joddrell
MSS.
L. C.
19th March,
1743.
Prochein ami.
Feme covert,
an infant
when the bill
was filed
having come
of age, moved
that it might
be dismissed.

For plaintiff it was said, that this was a very proper bill in itself; that the intent of it was to secure the wife's estate from alienation by the husband, who, notwithstanding the articles, was wasting it; that the trustees in the articles refuse to bring the bill, or to be concerned; and that this bill was brought by a near relation of the wife's purely to prevent her ruin.

Lord Chancellor [Lord Hardwicke].—The disabilities of infancy and coverture differ; for in the first, the reason of having a *prochein ami* is, because the infant is presumed not to have discretion to manage his affairs himself. In the other case, the proceedings are copied from those of the Ecclesiastical Court;

and the reason of having a *prochein ami* is not for the sake of the wife, but of the defendant, that he may be sure of his costs if an improper suit. This is her suit, and she may proceed or not; and the suit seems in this case fruitless, to have a settlement which she as soon as made may give up. It would be dangerous to lay down a rule, that such suits as these are the suits of the *prochein ami*, and subject to his discretion, and not the suits of the wife when she is of age; for that would put it in the power of any one to occasion suits between husband and wife. Now she is come of age, it is the same as if she had been so originally when the suit was commenced; and if so, the Court would not have permitted such bill to have been filed against her consent. Bill dismissed, and costs of *prochein ami* to be paid.

M. R.
Mar. 1836.
Two executors having filed a bill for an account which had at the hearing been dismissed with costs—Order under the circumstances, upon the petition of certain legatees and annuitants of the testator, that they might be at liberty to use the names of the said two executors, the plaintiffs in such cause, in any proceedings for appealing from the decree—such legatees and annuitants indemnifying the said two executors from all costs—and that the said two executors should deliver to such legatees and annuitants, or their solicitor, the briefs and other papers, they undertaking to return the same.

Edward Garsted and George Smallfield, plaintiffs.
Samuel Smith and Samuel Smith Shipley, defendants.

The plaintiffs and the defendant Smith were the executors of Samuel Smith the elder. Benjamin Todhunter and Anne his wife, John Miller and Mary his wife, Henry Moore and Eliza his wife, Martha Fenny, Newcome Smith, Eliza Smith, and Ann Smith, were legatees and annuitants under his will and codicil. The suit is that mentioned in *Miller v. Smith*, ante, p. 5. As is there stated, the bill prayed an account of partnership and other dealings and transactions between testator and the defendant Smith; and if the testator ever took or admitted the defendant Shipley into partnership in the business with him, then the like account as regarded the defendant Shipley, and an account of the stock in trade, monies, securities, and other estate and effects of the testator possessed by the defendant Smith, either as partner with the testator in his lifetime, or as one of his executors since his death, and it also prayed an injunction. As is there also stated, the cause was heard by the Vice-Chancellor in April, 1834, when an order was made dismissing the bill; but directing that the costs of all parties, as between solicitor and client, should be paid out of the estate; and the said B. Todhunter and the other before-named legatees and annuitants, being extremely dissatisfied with the said decree, applied for and obtained an order of the Master of the Rolls, dated March, 1836, by which it was ordered that they should be at liberty to use the names of the said plaintiffs, Garsted and Smallfield, in any proceedings that they the said

legatees and annuitants might be advised to take for appealing from the said decree.

The said order was founded upon a petition of the said B. Todhunter and the said other legatees and annuitants, and an affidavit of the said B. Todhunter in support of such petition. The said affidavit, after stating the proceedings in the suit, stated that, after pronouncing of the said decree, the object of the suit in which it was made and the state of the testator's affairs became known to the deponent and his co-petitioners, who thereupon became greatly dissatisfied with the said decree; for that it was found, as the fact was, that if the said decree should remain unreversed, the real and personal estate were not sufficient to provide for the several annuities and legacies given and bequeathed by the testator's will and codicil, the whole of which, together with the interest thereon, were still unpaid, except several of small amount, and there would be a considerable deficiency in that behalf; that since the pronouncing of the decree the deponent had prosecuted very active and searching inquiries on the subject of the several matters contained in the said bill of complaint of the said Edward Garsted and George Smallfield, and connected therewith, and had notwithstanding much disadvantage, arising out of his not being in possession of many important documents relating to the said matters, made many important discoveries, from which he has satisfied himself that the said defendants Samuel Smith and Samuel Smith Shipley were liable to account to the estate of the said testator to a very considerable amount, and that relief ought to have been decreed to the said plaintiffs, Edward Garsted and George Smallfield, accordingly.

The ensuing is a copy of the order made by the Master of the Rolls. Thursday, 26 March, 1836. M. R. Edward Garsted and George Smallfield, plaintiffs; Samuel Smith and Samuel Smith Shipley, defendants. Whereas Benjamin Todhunter and Anne his wife, John Miller and Mary his wife, Henry Moore and Eliza his wife, Martha Fenny, widow, Newcome Smith, Eliza Smith, spinster, and Anne Smith, widow, did, on the 21st March instant, prefer their petition unto the Right Honourable the Master of the Rolls, setting forth as therein set forth, and praying that the petitioners might be at liberty to use the names of Edward Garsted and George Smallfield as plaintiffs in the said cause in any proceedings that the petitioners might be advised to take for appealing from, or otherwise reviewing, the decree in the petition mentioned, upon the petitioners

indemnifying them from and in respect of all costs to or for which they or either of them might or could be made subject or liable in any such proceedings, and that it might be referred to one of the Masters of this Court to settle the proper indemnity to be given in that behalf, in case the parties differ about the same ; or otherwise that the petitioners might be at liberty to proceed as aforesaid in their own names, and that the said plaintiffs Edward Garsted and George Smallfield might be directed to deliver to the petitioners or to Mr. Henry Aston, their solicitor, or to deposit in the hands of the Clerk in Court in this cause, or otherwise as might be deemed expedient for the use of the petitioners for the purpose of any such proceedings, the several pleadings in this cause and all deeds, books, accounts, documents, vouchers, letters, papers and writings which were proved, or produced, or given in evidence, or otherwise used in this cause, or otherwise belonging or relating thereto, or to the matters connected therewith, which now are in the possession of them, or either of them, or of any solicitor of theirs : Whereupon all parties concerned were ordered to attend his lordship on the matter of the said petition, and counsel for the petitioners and for the plaintiffs this day attending accordingly. Upon hearing the said petition, the probate of the will of Samuel Smith, the testator, in the pleadings named, dated the 10th August, 1831, the decree dated the 28th April, 1834, and an affidavit of Benjamin Todhunter read, and what was alleged by the counsel for the petitioners and for the plaintiffs ; his lordship doth order that the petitioners be at liberty to use the names of Edward Garsted and George Smallfield as plaintiffs in the said cause, in any proceedings that the petitioners may be advised to take for appealing from or otherwise reviewing the decree in the petition mentioned, upon the petitioners indemnifying them from and in respect of all costs to or for which they or either of them may or can be made subject or liable in any such proceedings ; and it is ordered, that it be referred to the Master, to whom this cause stands referred, to settle the proper indemnity to be given in that behalf in case the parties differ about the same ; and it is ordered, that the said plaintiffs Edward Garsted and George Smallfield do deliver to the petitioners, or to Mr. Henry Aston, their solicitor, the several briefs and pleadings in the said cause, and all books, accounts, documents, papers and writings which were proved, or produced,

or given in evidence, or otherwise used in the said cause, or otherwise belonging or relating thereto, or to the matters connected therewith, which now are in the possession or power of them, or either of them, or of any solicitor of theirs, except all deeds and instruments, and except such documents, books, accounts, papers and writings as are necessary and required by the plaintiffs E. Garsted and G. Smallfield for or in respect of the administration of the said testator's estate, or in which they are interested in common with any parties other than the parties in the cause; the said petitioners undertaking to return the same. And it is ordered, that the said plaintiffs Edward Garsted and George Smallfield do produce all other the said excepted deeds and instruments, documents, books, accounts, papers and writings, and deposit the same in the hands of their Clerk in Court, to be verified by affidavit, for the use of the petitioners, at the expense of the petitioners, at all necessary times. And it is ordered that the petitioners do pay to the said plaintiffs Edward Garsted and George Smallfield their costs of this application, the same to be taxed by the said Master in case the parties differ about the same, and it is ordered that the petitioners or the plaintiffs be at liberty to apply to this Court as there may be occasion.—Reg. Lib. A. 1835, fol. 461.

QUESTIONS OF LAW.

Lord Eldon has said that what was not a subject of doubt to him when Chief Justice of the Common Pleas, nevertheless, was a subject of doubt to him when Lord Chancellor; the constitution of our Courts of Justice requiring him to decide all questions of law as Chief Justice of the Common Pleas, and prohibiting him to decide the same as Lord Chancellor.—Extract from a chapter in a law MS. entitled "Anomalies of our Judicial Institutions." [1802.]

The Improvement of Jurisdiction of Equity Act, 15 & 16 Vict. c. 86, contains the following provision. Sect. 61: It shall not be lawful for the said Court of Chancery, in any cause or matter, to direct a case to be stated for the opinion of any Court of Common Law, but the said Court of Chancery shall have full power to determine any questions of law, which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties.

Questions of Law.

Remarks.
Questions of Law.—Provision of the Improvement of Jurisdiction of Equity Act.

RECIPROCITY.

L. C.
July, 1822.
Reciprocity.

Lord Eldon.—That reciprocity, which is so material in cases of specific performance, is immaterial in many cases of injunction.—MS. Notes.

Remarks. See the observations made by Lord Eldon whilst the argument was proceeding in *The Duke of Bedford v. British Museum*.*

Fitzharris v. Stuart.

V. C.
June, 1837.
Erroneous information respecting the practice.

Sir Anthony Hart.—It is not a sufficient reason for coming to the Court to be relieved against an order that the party has unfortunately received erroneous information respecting the practice.†

Moore v. Moody.

V. C.
March, 1833.
Decree obtained by irregular practice or by surprise.

Sir John Leach.—If a decree is obtained by irregular practice, or by surprise, this Court will set it aside.‡

LAND.—DEEDS.

Land—Deeds. In suit to recover land the common course is, that the defendant, having set out by his plea or answer the deed under which he has acquired the land, proves it at the hearing. Now that deed destroying the plaintiff's right to the land, and the deeds being as it were part of the land, plaintiff shall touch none of them, that which is necessarily given in evidence excepted.—Old MS. Note in a Book of Practice.§

Robinson v. Lord Byron.||

L. C.
May, 1784.
Injunction to stay defendant from maintaining or using shuttles, flood-gates, erections, or other devices, so as to prevent water from flowing down a river in such regular quantity as it had ordinarily done.

Saturday, 7th May, 1784. George Robinson and James Robinson, plaintiffs; and the Right Honourable William Lord Byron, defendant. Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor of Great Britain by Mr. Madocks, being of counsel for the plaintiffs, it was alleged, that it appears by the affidavit of Robert Stanley and Francis Englefield, and first by the affidavit of the said

* 1 Rep. temp. Cott. 90—95.

† See *Taylor v. Thomas*, 1 Rep. temp. Cott. 277.

‡ See *Hood v. Pimm*, 1 Rep. temp. Cott. 279.

§ See before, pp. 35—37, and 80.

|| See 1 Brown's C. C. 588.

Robert Stanley, that, &c. &c. &c. To be relieved wherein and for an injunction, the plaintiffs have exhibited their bill in this court against the defendant, as by the Six Clerk's certificate appears; And, therefore, it was prayed that the defendant, William Lord Byron, may be restrained by injunction from stopping or obstructing the free course of the River Lene from the defendant's Lower Lake at Newstead, to the plaintiff's mills, in the bill and hereinbefore mentioned, and from stopping or obstructing the free course of the stream from Annesley and Kirkby to the River Lene, as the said river and stream flowed before the 4th day of April last. Whereupon and upon hearing the said affidavits read, his lordship doth order that an injunction be awarded to stay the defendant, his servants, workmen, and agents from maintaining or using the shuttles, floodgates, erections, or other devices so as to prevent the water from flowing down the said River Lene in such regular quantity as it had ordinarily done before the 4th day of April last, until the defendant shall fully answer the plaintiffs' bill, and this court make other order to the contrary.—Reg. Lib. B. 1784, fol. 143.

Gates v. Hunter.

Thursday, 1st February, 1727. William Gates, plaintiff; Robert Hunter and wife, defendants. Upon opening of the matter this present day unto this court by Mr. Solicitor-General [Charles Talbot, Esq.], being of the plaintiff's counsel, it was alleged, that it appears by the affidavit of the plaintiff, William Gates, that he hath very lately and since publication in this cause passed, come at the knowledge and discovery of a paper writing in the hands of one Mr. Amos Callard, purporting to be a particular or rental of the lands and premises in the county of Lincoln, being part of the lands in question in this cause, and late the estate of Sir Thomas Orby, deceased, which said particular or rental, and how and for what purpose the same came into the possession of the said Mr. Callard, and whether any copy or copies of the same were ever delivered to the said defendant Hunter, and by whom or by whose order or direction, will be very necessary and material to be proved before the hearing of this cause on the said plaintiff's behalf; And the said plaintiff having, before publication passed, endeavoured all that in him lay to discover where and in whose custody the

Court of
Chancery,
Feb. 1727.

Order that
plaintiff
should be at
liberty, not-
withstanding
publication
passed, to ex-
amine viva
voce a wit-
ness for him
at the hearing
of the cause.

said particular was, but could never learn till now where the same was—It was, therefore, prayed, that the plaintiff may be at liberty, notwithstanding publication is passed in this cause, to examine the said Mr. Amos Callard, of New Inn, gentleman, touching the said paper writing in his custody, purporting to be a particular of the lands and premises in the county of Lincoln, being part of the lands in question in this cause, and how the same came into his custody, and whether any copy or copies of the said paper writing were delivered to the said defendant Hunter, and when and by whom and by whose order or direction. Whereupon and upon hearing of Mr. Lutwych, of counsel with the defendant Hunter, and what was alleged on both sides: It is ordered, that the plaintiff be at liberty, notwithstanding publication in this cause is passed, to examine the said Mr. Callard *vivâ voce* as a witness for him at the hearing of this cause, touching the said particular, as to the time when it came to his hands, and when and upon what occasion he showed it to the defendant Hunter, who is to be at liberty to cross-examine him.—Reg. Lib. A. 1727, fol. 178.

COSTS—CAUSE TWICE SET DOWN.

Costs.—Cause twice set down.

Where, from the plaintiff's default, the cause has been twice set down before the decree was pronounced, the defendant, nevertheless, cannot have the costs occasioned by the double setting down, unless the court has so specially ordered.—MS. Notes of Practice end of last Century.

Remarks.

By the 34th of the General Orders, April, 1828, when a cause which stands for hearing is called on to be heard, but cannot be decided by reason of a want of parties, or other defect on the part of the plaintiff, and is therefore struck out of the paper; if the same cause is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit.

Bennett v. Howell.

V. C.
Feb. 1824.
Misjoinder of
plaintiffs.

Sir J. Leach.—Misjoinder of plaintiffs is in general no ground for the dismissal of a bill.

V. C.
Feb. 1824.
Misjoinder of
plaintiffs.

_____ v. _____
Sir J. Leach.—Where some of the plaintiffs are entitled to the whole of the relief sought by the bill, and others are for any rea-

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